SUPREME COURT, U.S.
FILED

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NO._____

THE SUPREME COURT OF THE UNITED STATES

In re Gary R. Wall, William Cooksey Sr., Stephen Manos,
Petitioners

v.

Robert M. Cheverie, Charles LeConche, Dominick Lopreato
Trustee, John Pezzente, Laborers' International Union of North
America, Vere O. Haynes, Robert D. Luskin, Michael S. Bearse
General Counsel LIUNA, Frank Freeman Laborers' Local 230
Respondents

On Petition For Writ Of Certiorari To The United States Court Of
Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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5788

Rule 14(1)(a) Questions

1. Did The Second Circuit's Panel of Hon. Chester J. Straub, Hon. Ralph K. Winter, Hon. Thomas J. Meskill SUMMARY ORDER AFFIRMING the district courts ruling – on Claim One 18 U.S.C. 1964(c) – granting Cheverie et al motion to dismiss with prejudice – granting defendant Luskin's motion to dismiss with prejudice for failure to state a claim pursuant to F.R.C.P. 12(b)(6). Conflict with United States Supreme Court decisions Sedima –v- Imrex 473 U.S. 479, United States v. Turkette 453 U. S. 576 – regarding the statutory construction of the "enterprise" [18 USC 1961(4)] element of the Racketeering Influenced and Corrupt Organization Act. In spite of the fact that the plaintiffs pleaded "enterprise racketeering injuries"

2. Did the Second Circuit's panel of Hon. Chester J. Straub, Hon. Ralph K. Winter, Hon. Thomas J. Meskill SUMMARY ORDER AFFIRMING the district court's ruling – on Claim One 18 USC 1964(c) – granting Cheverie et al motion to dismiss with prejudice – granting

defendant Luskin's motion to dismiss with prejudice, for failure to state a claim pursuant to F.R.C.P. 12(b)(6) – sanctioned a departure from the accepted course of judicial proceedings, by being in direct conflict with the following case authorities of the Second Circuit regarding the "enterprise" and "pattern" requirements of Racketeering Influenced and Corrupt Organization Act as to call for the exercise of The United States Supreme Court's supervisory power. Case Authorities: United States –v- Indelicato En Banc 865 Fed. Rep. 2d 1370, United States –v- Ianniello 808 F. 2d 184 (2d Cir), United States –v- Weisman 624 F. 2d 1118 (2d Cir.) United States –v- International Teamsters 708 F. Supp. 1388 (S.D.N.Y. 1989).

3. Did the Second Circuit's panel of Hon. Chester J. Straub, Hon. Ralph K. Winter, Hon. Thomas J. Meskill, SUMMARY ORDER AFFIRMING, the district court's ruling – on Claim One – 18 USC 1964(c)-granting Cheverie et al motion to dismiss with prejudice – granting defendant Luskin's motion to dismiss with prejudice, for

failure to state a claim pursuant to F.R.C.P. 12(b)(6) – conflict with the decision of The United States Court of Appeals for the 3rd Circuit in United States –v- Local 560 780 Fed. Rep. 267 (3rd Cir. 1985) on the same important matter, application of 18 U.S.C. 2, as a predicate act violation of Racketeering Influenced and Corrupt Organization Act.

4. Did the Second Circuit's panel of Hon. Chester J. Straub, Hon. Ralph K. Winter, Hon. Thomas J. Meskill SUMMARY ORDER – AFFIRMING the district court's ruling on Claim One 18 U.S.C. 1964(c) –granting Cheverie et al motion to dismiss with prejudice – granting defendant Luskin's motion to dismiss with prejudice for failure to state a claim pursuant to F.R.C.P. 12(b)(6) violate the plaintiffs statutory rights under 18 U.S.C. 1964(c) that: 18 U.S.C. 1959 –"may not be considered in support of plaintiffs cause of action"---as a RICO predicate – and in so doing also conflict with its [the 2d Cir's] own finding in U.S. –v- Concepcion 983 F. 2d 369 (2d Cir. 1992).

///

5. Did the Second Circuit's panel of Hon. Chester J. Straub, Hon. Ralph K. Winter, Hon. Thomas J. Meskill SUMMARY ORDER AFFIRMING the district court ruling violate the plaintiffs statutory rights by sanctioning that: 29 U.S.C. 530 (deprivation of union rights by violence) ---"may not be considered in support of plaintiffs cause of action"—as a RICO predicate, sanction a pattern of intentional erroneous interpretations of the statutory construction of a RICO claim by the district court.

6. Did the Second Circuit's panel of Hon. Chester J. Straub, Hon. Ralph K. Winter, Hon. Thomas J. Meskill, engage in conduct prejudicial to the effective administration of Justice.

By protecting Hon. Janet C. Hall's [U.S.D.J.] flagrant misrepresentation of [documented] facts that supported predicate violations of Racketeering Influenced and Corrupt Organizations Act.

By protecting the [documented] intentional misidentification of a timely Rule 59(e) motion, as a Rule 59(a) – Rule 59 (b) Motion

By protecting Hon. Janet C. Hall from the [documented] intentional concealment and then intentional misidentification of a Rule 60(b)(6) Motion

By denying the plaintiffs their applicatory right to the "any person" clause of 18 U.S.C. 1964(c) in spite of the quantity and quality of evidence presented at F.R.C.P. 12(b)(6) level showing the graverman of this case extortion 18 U.S.C. 1951 [Hobbs Act] of the plaintiffs LMRDA Rights [29 U.S.C. 401 et seq.] through "Enterprise Racketeering Injuries" by an effective date [Oct. 15, 1970] RICO enterprise and in so doing did the 2d Cir. panel violate their oath of office to "administer justice without respect to persons" and to "faithfully and impartially discharge and perform all --- duties incumbent upon [them]--- under the constitution and laws of The United States" 28 U.SC. 453

IN COMPLIANCE WITH SUP. CT. RULE 14(1)(a) NO OTHER INFORMATION WILL APPEAR ON THIS PAGE

V

SUP. CT. RULE 14(b)

1. Respondent Robert D. Luskin – General Executive Board Attorney Laborers' International Union/In-House prosecutor per signed agreement with the Department of Justice.

2. Respondent Vere O. Haynes – First Vice President Laborers' International Union – Signatory "Operational Agreement" with the Department of Justice.

3. Respondent Michael S. Bearse – General Counsel Laborers' International Union.

4. Respondent Laborers' Local 230 "Legal Entity" "Corporation" 18 U.S.C. 1961(3) and an "enterprise" 18 U.S.C. 1961(4).

5. Respondent Laborers' International Union of North America a "Legal Entity" "Corporation" 18 U.S.C. 1961(3) and an "enterprise" 18 U.S.C. 1961(4).

6. Respondent Dominick Lopreato Business Manager Local 230 at pertinent times in the complaint.

7. Respondent John Pezzente Officer Local 230.

8. Respondent Charles LeConche presently Business Manager Local 230.

9. Respondent Robert M. Cheverie General Counsel Local 230.

10. Respondent Harriet Roman Secretary/Dispatcher Local 230 withdrawn from case by petitioners, at the district level.

11. Respondent Frank Freeman at relevant times, Sargent At Arms/Vice President Local 230.

12. The Enterprise 18 U.S.C. 1961(4) October 15, 1970 to February 13, 1995 pleaded as the Coia/Lopreato Group – February 13, 1995 to present day pleaded as the Luskin/Coia/Lopreato Group.

CITED WRONGDOERS

Wrongdoer One Executive Board Local 230, **Wrongdoer Two** Peter F. Vaira Independent Hearing Officer, **Wrongdoer Three** W. Douglas Gow L.I.U.N.A. Inspector General **Wrongdoer Four** Arthur E. Coia, General President L.I.U.N.A, **Wrongdoer Five** Paul E. Coffey, Chief O.C.R.S. Criminal Division Department of

Justice, **Wrongdoer Six** Ms. Janet Reno, Attorney General of The United States.

Sup. CT. Rule 14(c)

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Sup. CT. Rule 14(d)

Judgment Entered July 14, 2000

"This matter came on before the Honorable Janet C. Hall, United States District Judge, as a result of defendants' motion to dismiss.

The Court has reviewed all of the papers filed in conjunction with the motion and heard oral argument on July 12, 2000, a ruling on pending motions entered granting the defendants' Cheverie, et al motion to dismiss with prejudice and granting defendant Luskin's motion to dismiss with prejudice except that it is without prejudice as to the due process claim only.

Therefore, it is ORDERED and ADJUDGED that judgment is entered for the defendants and the case is closed dated at Bridgeport, Connecticut, this 14th day of July, 2000."

SUMMARY ORDER dated September 6, 2001 page No. 2

"The facts giving rise to this action are described in this Court's opinion in Wall v. Construction & General Laborers' Union, Local 230, 224 F. 3d 168 (2d Cir). 2000)"

SUP. CT. RULE 14(e)

Jurisdiction pursuant to 28 U.S.C. 1651 (a) is in aid of this Court's Appellate jurisdiction.

SUP. CT. RULE 14(e)(i) September 6, 2001

SUP. CT. RULE 14(e)(ii) November 15, 2001

SUP. CT. RULE 14(e)(iii) NA

SUP. CT. RULE 14(f)

18 U.S.C. 1964(c), 18 U.S.C. 1962(b)(c)(d), 18 U.S.C. 1961(1)(5), 18 U.S.C. 1951, 18 U.S.C.1951(b)(2), 18 U.S.C. 1341, 18 U.S.C. 1343, 18 U.S.C. 2, 18 U.S.C. 1512, 29 U.S.C. 411, 29 U.S.C. 401, 29 U.S.C. 530, 29 U.S.C. 501, 18 U.S.C. 1959 In the Control and Maintenance of 18 U.S.C. 1961(4).

Sup. CT. Rule 14(g)

As stated in the Second Circuits' panels SUMMARY ORDER "The facts giving rise to this action are described in this Court's opinion in Wall –v- Construction & General Laborers' Union Local 230 224 F. 3d 168 (2d Cir). 2000)" [depositions are presently being taken in Wall v. Local 230 Supra pro se in the Federal Court House Hartford, Connecticut]. This RICO action occurred off of Wall Supra first in the form of an injunction –

District Court Case No. 3:97-CV-02502(JCH) D.C. Dkt. #1, 3, 4, 5 – because of the [documented on tape] violent assault and extortionate tactics committed against an affiant [Stephen Manos] at that time in Wall Supra. Affiant Stephen Manos was not a plaintiff in the RICO complaint or the Civil Rights Complaint at the time. The injunction was also filed because my attorney at the time stated he was concerned for his physical safety in Wall Supra [Raised on the record] and it was also filed to stay my pension before it expired December 31, 1997 or to stay the tolling of the ERISA Statute because of the perjurious affidavits and declaration filed in Wall Supra. The district denied the injunction but allowed the plaintiffs to file a RICO Standing Order D.C. Dkt. #37 and supplement to Standing Order D.C.Dkt. #52. The district court approximately one year later in D.C. Dkt. #97 dismisses the RICO Standing Order, in so doing, the district court does not print the word "enterprise" even once in spite of the fact that "enterprise racketeering injuries" are pleaded throughout.

The petitioners are aware of this Courts Holding

#2 In Sedima –v- Imrex 473 U. S. 479

"2. Nor is there any requirement that in order to maintain a private action under 1964(c) the plaintiffs must establish a "racketeering injury" not merely an injury resulting from the predicate acts themselves"---

The petitioners chose the higher pleading requirement of "enterprise racketeering injuries" not to restrict themselves – but because the predicate acts that harmed the petitioners were acts committed in the circumstances delineated in 1962(b)(c)(d)---" in the conduct of such enterprise affairs"---"an activity which RICO was designed to deter".

It is a fact that when RICO was drafted October 15, 1970 the "governance structure"[terminology used by President Regan's Crime Commission] of LIUNA was an objective target not a subjective target. That "governance structure" has remained the same pursuant to the "Operational Agreement" with the Department of Justice and where some of the "Hierarchical" "Associates In Fact" have died or retired their sons have replaced them. At the direction of lead hierarchical defendant/Respondent Robert D. Luskin in violation of 18 U.S.C. 1962(c) and (d) and has also facilitated multiple predicate crimes in violation of 18 U.S.C.

2. Also corresponding with the district courts intentional avoidance of "enterprise" in its' first dismissal of the Standing Order D.C.Dkt. #97 the district court also never prints the word facilitating or address the facilitating, averments pleaded throughout the RICO Standing Order D.C. Dkt. #37 and 52. When this fact was also raised in petitioners 2d Amended Complaint the district court in its ruling dated July 12, 2000 [Subject of Appeal In Second Circuit] the district court now states:

> ---"The plaintiffs additionally cite 18 U.S.C. 2 (aiding and abetting liability)--- "However, none of these are included as "predicate acts" under Civil RICO statute, and therefore may not be considered in support of plaintiffs' cause of action [see pleading under Sup. CT. Rule 14(h)]".

When the petitioners refuse to change their pleading position in their "Repleading of 2d Amended Complaint" the district court then in its July 12, 2000 Ruling [subject of appeal in Second Circuit] address the "enterprise" element by stating the petitioners did not meet the pattern requirement.

Stating: --"If they have, the court would then further consider the nature of the enterprise as the plaintiffs suggest. If they have not

reach the "enterprise" issue and must dismiss the plaintiff's complaint for failure to state a claim".

In spite of the fact that the district courts statement is a misconstruction of Title IX (OCCA) RICO [see pleading under Sup. CT. rule 14(h)] the petitioners showed clearly with documents the acquisition by fraud of Local 230 by LIUNA stated with particularity under Rule 9(b) F.R.C.P. – i.e. Fraudulent LM 2, LM 15, LM 15A, 16 Trusteeship Reporting forms. Three of the Respondent/defendants were involved in that acquisition by fraud. in or about the effective date of RICO October 15, 1970. All Arthur A. Coia and Arthur E. Coia "Associates in Fact". The cause of the unprecedented corruption that has occurred against the petitioners by the defendants and the courts below is the corrupt political, and corrupt financial influence of the Democratic National Committee by which a 3.1 million dollar donation by Arthur A. Coia which bought out a 212 page RICO complaint. [see petition for an extraordinary writ filed this same day]. And, in doing so, the 3.1 million allowed respondent Robert D. Luskin to criminally devise the "Operational Agreement" not only to stop Arthur A. Coia from being indicted but also it was in full effect for

5 years – that was a purposeful time period in order to protect his client from the last predicate act rule of R.I.C.O. [tolling 5 years]

The effect of the stated cause the[Operational Agreement] is the "Enterprise Racketeering Injuries" to the petitioners, by an "enterprise" of this "nature". The effect on the judicial system is the obstruction of the entire system.

In pleading against the "Operational Agreement" the petitioners were aware of this courts rejection in H. J. Inc. v. North Western Bell 492 U.S. 229 of the Eighth Circuit's multi scheme test, as being to restrictive on the plaintiff or prosecutor – nevertheless the petitioners chose the higher pleading requirement to plead against the "Operational Agreement" inter alia – as one of four multi scheme test.

"Scheme #1" was pleading in the re-pleading of the Second Amended Complaint and titled:

"The Operational Agreement" Scheme in the Meaning of 18 U.S.C. 1962(d)(c)(b) Violating 18 U.S.C. 1961(1)(5)"

None of the "Racketeering Schemes" were addressed by the courts below, as were none of the 15 Affidavits filed by or on

behalf of the plaintiffs, in spite of the actual serious violence and threats of serious violence swore by multiple affiants in this matter.

It is a shame that the "facts material to consideration of the questions presented" in compliance with Sup. CT. Rule 14(g) is a "Racketeering Scheme" in the meaning of 18 U.S.C. 1962(d), that being; The [Operational Agreement] that has caused the entire democratic system of laws and the enforcement of laws in the United States to fail – from the perjurious testimony by respondent Robert D. Luskin – before Senator William McCollum subcommittee on Crime July 25, 1996 [relevant parts entered in the district court and the second circuit] to the failure of the Federal Bureau of Investigation, the Attorney Generals Office and the courts below. Also on July 25, 1996, Paul E. Coffey being questioned by Congressman McCollum's Subcommittee on Crime in his capacity as Chief Organized Crime and Racketeering Section Criminal Division U. S. Department of Justice stated when asked why the 212 page RICO complaint was dropped – Mr. Coffey stated"

"WE NEVER HAD A UNION THAT SAID, WE'LL TAKE ON THE MOB BEFORE YOU FILE"

That absurd statement was referring to Arthur A. Coia and his "associates in fact" that they would take on the mob. In addition, in order to show the deliberate disregard for the Rule of Law by respondent Luskin (and the D.O.J), in or about April 1995 Washington, D. C., when questioned by the Hon. District Court Judge Emmett G. Sullivan, when asked by Judge Sullivan "Here's a man the President of the union, who's accused of being associated with Organized Crime, the focus of a 212 page complaint why wasn't Coia removed?" Respondent Luskin responded stating that the draft complaint was more of a "bargaining tool" for the government to initiate talks than an accurate depiction of the union and Coia. The illegality here on the part of respondent Luskin and the D.O.J. is a violation of the principles of federal prosecution. See: United States Attorney's Manual Chapter 110-9-110. 401 Page 5 "Inclusion of a RICO count in an indictment solely or even primarily to create a bargaining tool for later plea negotiations on lesser counts would not be appropriate and would violate the principles of federal prosecution." This petitioners believes that Arthur A. Coia is and has been for many years a "Top Echelon Informant" who in

concert with his "associates in fact" "enterprise" has been allowed to commit a multitude of racketeering crimes [documented looted Local 230 and its funds three (3) times for millions). This petitioner believes that this blanket immunity in the meaning of United States v. Carter 454 F. 2d 426 (which also blankets Coia's associates in fact conspirators) extends into the District of Connecticut and nationally pursuant to the "Operational Agreement". What is of exceptional importance here is for this court to not allow RICO to be beat like this, and to stop the last effective date (10/15/70) RICO enterprise (18 U.S.C. 1961(4)) and set an example and never allow another "Operational Agreement" to exist or have anyone corruptly use Title IX of the Organized Crime Control Act 1970 – no matter who they are and what their credentials are.

Sup. CT. Rule 14(g)(ii) "Any Person" clause 18 U.S.C. 1964(c)

Sup. CT. Rule 14(h)

The petitioners concise argument amplifying the reasons relied on for allowance of the Writ in conjunction with Sup. CT. Rule 10(a) must start with three conditions in this case that were avoided by the courts below – they are (1) an "Enterprise" [18 U.

S.C. 1961(4)] (Effective Date and Nature of) (2) an "Enterprise Conspiracy" [18 U.S.C. 1962(d)] (3) the pleading of "Enterprise Racketeering Injuries" [18 U.S.C. 1961(1)(B) 1961(1)(C), 18 U.S.C. 1961(5)].

What is of great importance to the petitioners by proximate harm regarding the three enterprise conditions, and what is of great importance to the United States regarding the three enterprise conditions is the same, explained in the following.

One of the primary reasons for the drafting of RICO was to bridge the statutory case authority wall, between trade unions and pension funds and other funds created as quasi racketeering schemes by the trade unions. In depositions just taken January 2002, in Wall Supra 3:97 CV09402(JCH), we have bridged the statutory case authority wall, by clear documented proof of a "wheel" and "chain" criminal conspiracy between the union and the pension fund, stealing our pension money as individuals. This is what subsection 1962(d) was written for. – "highly diverse crimes". And this is the reason the petitioners chose the higher pleading level at F.R.C.P. 12(b)(6) of "Enterprise Racketeering Injuries" because all of the petitioners were harmed in different but

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like ways in the meaning of "Relationship" and "Continuity" by an ENTERPRISE CONSPIRACY (effective date October 15, 1970) – (proximate harm to petitioners Wall & Cooksey Sr in or about 1986 to present day – proximate harm to petitioner Manos in or about 1995 to present day).

This petitioner believes that the United States Court of Appeal Fifth Circuit sitting En Banc has best defined the RICO element of "enterprise conspiracy" in U.S. –v- Elliott 571 Fed. Rep. 2d 880 at 902.

> "---against this background, we are convinced that, through RICO, Congress intended to authorize the single prosecution of a multi-faceted conspiracy by replacing the inadequate "wheel" and "chain" rational with a new statutory concept: The Enterprise".
>
> "[9-11] To achieve this result, Congress acted against the back drop of horn book conspiracy law, under the general federal conspiracy statute---/---in the context of organized crime, this principle inhibited mass prosecutions because a single agreement or "common objective" cannot be inferred from the commission of highly diverse crimes by

apparently unrelated individuals. RICO helps to eliminate this problem by creating a substantive offense which ties together these diverse parties and crimes. Thus the object of a RICO conspiracy is to violate a substantive RICO provision-here, to conduct or participate in the affairs of an enterprise through a pattern of racketeering activity – and not merely to commit each of the predicate crimes necessary to demonstrate a pattern of racketeering activity"---

Argument in Support of Question No. (1)

The argument regarding the erroneous statutory construction of the enterprise element of RICO by the district court, affirmed by Summary Order, by the Second Circuit is in conflict with this court's instructions and guidance stated in, Sedima –v- Imrex 473 U.S. 479, United States v. Tukette 453 U. S. 576

First shown is the district Court's erroneous interpretation of the statutory construction of the enterprise element at 6 footnote 2 of the district court's ruling – entry date July 12, 2000 – attachment #15 in the Appellate Court – quoted in its relevant parts.

"The district court: "The plaintiffs contend that this court erred in failing to discuss the nature of the "enterprise" alleged by the plaintiffs in its prior ruling dated July 29, 1999 Dkt. No. 97"---"The court understands the defendants argument to be that even if the court were to assume that such an enterprise did exist, the plaintiffs have nevertheless failed to meet other requirements of alleging a cause of action under RICO – specifically, the defendants argue the plaintiffs have not alleged a pattern of racketeering activity. Because allegations of a pattern of racketeering activity are a required part of RICO action based on 18 U.S.C. 1962(b), (c), and (d) the court must examine whether the plaintiffs have alleged sufficient facts to meet this requirement. If they have, the court would then further consider the nature of the enterprise as the plaintiffs suggest. If they have not reach the "enterprise issue and must dismiss the plaintiffs' complaint for failure to state a claim".

See Now: Sedima –v- Imrex 473 U. S. 479 ID. 496 showing the sequence of statutory construction of a violation of Section 1962(c)

"a violation of 1962(c) the section on which Sedima relies requires (1)conduct (2)of an enterprise (3)through a pattern (4)of racketeering activity."

Next showing is the district courts erroneous interpretation of the statutory construction of the enterprise element in conflict with Turkette Supra At 27 of district Courts Ruling – entry date July 12, 2000 – Attachment #15 in the Appellate Court – Affirmed by Summary Order – quoted in its relevant part.

The district Court: ---"Although the plaintiffs pleadings provide a lengthy background on corruption in Local 230 dating back to 1970, nothing in the pleadings serves to connect such events to the events they claim are "predicate acts". Other than general allegations that Local 230 has been under control of Arthur Coia and his cohorts, nothing connects the defendants alleged predicate acts to one another or the alleged Coia "machine" other than the mere fact that each of the defendants is an employee or member of Local 230 and thus, are alleged to have been committing their wide –ranging acts in order to maintain the alleged "enterprise"---

Now see the Turkette Court's instructions and guidance At 453 U. S. 576 Id. 583

---"In order to secure a conviction under RICO the government must prove both the existence of an "enterprise" and the connected "pattern of racketeering activity." The enterprise is an entity for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is on the other hand, a series of criminal acts as defined by the statute 18 U.S.C. 1961(1) (1976 Ed Supp. 111). The former is proved by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proof of one does not necessarily establish the other. The "enterprise" is not the "pattern of racketeering activity," It is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the government."

Relevant background re: "Enterprise" element: The district court in first dismissing the "Standing Order" D. C. Dkt. #37 Appellate Court Attachment #5 and in dismissing the supplemental filing to the "Standing Order" D. C. Dkt. #52, Appellate Attachment #6, never even prints the word "enterprise" in its first ruling D. C. Dkt. #97.

When the petitioners raised that argument in their "Second Amended Complaint" D. C. Dkt. #99 Appellate Attachment #9, #10 and #11 – the subject complaint of the appeal to the Second Circuit, and this writ – the district court then refuses to "reach" the enterprise issue or "consider" the "nature of the enterprise". In direct conflict with Sedima Supra and Turkette Supra

Argument In Support of Question #2

The argument regarding the erroneous statutory construction of the enterprise element of RICO by the district court (See first quote in first argument) affirmed by Summary Order by the Second Circuit is also in conflict with the following case authorities of the Second Circuit regarding the statutory construction and relationship of the "enterprise" and "pattern" requirements of Title IX RICO they are:

U.S. –v- Indelicato 865 Fed. Rep. 2d 1370 2d Cir. En Banc Citing U. S. –v- Weisman 624 F. 2d 1118 2d Cir.

"The "enterprise" itself supplies a significant unifying link between the various predicate acts specified in Section 1961(1) that may constitute a RICO pattern."

See also: Indelicato En Banc Finding 7 Id. 1370

"Relatedness and continuity necessary to show RICO "pattern" may, in appropriate cases be established through nature of RICO enterprise 18 U.S.C. 1961(1,4,5,)"

See also: Indelicato En Banc Finding #9 Id. 1370

"Evidence of nature of RICO enterprise maybe used to show threat of continuity sufficient to establish RICO pattern 18 U.S.C. 1961 (1,4, 5)"

See also: United States –v- Ianniello 808 F. 2d 184 ID. 191 (2d Cir)

"---While recognizing that an inquiry must be made as to "relatedness" and "continuity" we concluded that these concepts did not affect the existence of pattern but were best addressed in the context of the concept of "enterprise"

See also: in Second Circuits jurisdiction (S.D.N.Y.) important Labor Racketeering Case U. S. –v- I.B.T. 708 F. Supp. 1388 at 1405

> "A RICO claim requires proof of (1)an enterprise, and (2)either participation in the enterprise or the acquisition or maintenance of an interest or control of the enterprise through a pattern of racketeering"

Argument in Support of Question #3

The district courts ruling entry date July 12, 2000, Appellate Attachment #15 At 8 affirmed by Summary Order of the Second Circuit is in error and in conflict with the 3rd Circuit regarding application of 18 U.S.C. 2 to Title IX RICO

> District Court: "The plaintiffs additionally cite 18 U.S.C. 2 (aiding and abetting liability):"---
>
> "However, none of these are included as "predicate acts" under Civil RICO statute, and therefore, may not be considered in support of plaintiffs cause of action".

See Now the Third Circuit in United States –v- Local 560, 780 F. 2d 267 Finding #9 At 269

"Criminal standard for aiding and abetting applied to charge in civil Racketeering Influenced and Corrupt Organization Act [18 U.S.C.A. 1961 et seq] suit that unions executive board aided and abetted other defendants extortionate acts 18 U.S.C.A. 2, 1962"

See Also Footnote #25 AT 288 560 Supra

"We conclude that under RICO, an individual need not himself commit two requisite predicate offenses as long as that same individual aids and abets the commission of the predicate offenses. Indeed, there is no authority to suggest that 18 U.S.C. 2(a) does not apply to RICO. Under 18 U.S.C. 2(a) whoever "aids, abets, counsels, commands, induces, or procures [the commission of an offense against the United States] is punishable as a principal"

18 U.S.C. 2 is averted inter alia against respondent Robert D. Luskin in his capacity as G.E.B. attorney and "In House Prosecutor" per signed agreement with the Department of Justice multiple times. 18 U.S.C. 2 is also averted multiple times against respondent Vere O. Haynes in his capacity as 1st V. P. LIUNA and

signatory to the "Operational Agreement" with the Department of Justice.

Argument In Support of Question #4

Also in the district court's ruling entry date July 12, 2000 Appellate Attachment #15 At 8 affirmed by Summary Order of the Second Circuit. The district stated in error and in conflict with the Second Circuit's decision in U. S. –v- Concepcion 983 F. 2d 369 (2d Cir. 1992) that:

> "---18 U. S.C. 1959 (commission of violent crimes in furtherance of racketeering activity"-- ---"However, none of these are included as "predicate acts" under civil RICO statute, and therefore may not be considered in support of plaintiffs cause of action."

See now U. S. –v- Concepcion 983 F. 2d 369 (2d Cir. 1992) Holding #14 At 380

> "[14]Section 1959, which was enacted to complement RICO see generally S. Rep. No. 225 98th Cong., 1st Sess. 304-07 (1983) ("S.Rep. No. 225") reprinted in 1984 U. S. Code"---

Argument In Support of Question #5

The district court also rejected in the same ruling affirmed by Summary Order of the Second Circuit that 29 U.S.C. 530 may not be considered in support of RICO action.

> District Court: ---"29 U.S.C. 530 (deprivation of union rights by violence or threat of violence)"---
>
> "However, none of these are included as "predicate acts" under civil RICO statute, and therefore may not be considered in support of plaintiffs cause of action".

The district court makes that finding and the Circuit affirms because 29 USC 530 is not illustrated in either subsection 1961(1)(B) or Subsection 1961(1)(C) – on close analysis the court will see the difference between 1961(1)(B) and 1961(1)(C) – 1961(1)(B) states "any act which is indictable under any of the following provisions of Title 18 U. S. Code" and then Congress illustrates their following provisions. 1961(1)(C) is different it states "any act which is indictable under Title 29 U.S. Code" and then Congress makes two examples. It does not state under the "following provisions" The Congressional statement "any act which is indictable under Title 29 U.S. Code" is the key phrase.

Now see to show that 29 U.S.C. 530 is an indictable offense see U. S. –v- Agone 302 Fed. Supp. 1258 Southern District of New York 1969 Pre-RICO quote at 1258 "The one count indictment in this case says" - "Laid under 29 U.S.C. 530 and 411(a)(2)" Indictment dismissed for other reason U. S. Attorney did not name the victim.

It is contrary to common sense that Congress would exclude an actual assault in "deprivation of Union Rights" [29 USC 530] and only take aim at the threat of an assault [18 USC 1951 – Hobbs Act] as a RICO predicate. That determination would also be contrary to the finding in this court in Turkettee Supra and in Russello –v- United States 464 U. S. 16 the "declared purpose" of Congress in enacting the RICO statute – "To seek the eradication of organized crime in the United States"

Argument in Support of Question #6

The petitioners start their argument with a facial showing clarifying the incorrect and intentional mischaracterization of the facts and the intentional statutory mischaracterization of the pleadings by the district Court that directly effected the Circuit Panel's decision. Shown how; in its relevant quoted parts, the

Circuit Panel's Findings on page 4 of their Summary Order [entire Summary Order printed verbatim and entered in Appendix (i)(i)]

4th paragraph page 4 of Summary Order

> "Further the district court was correct in denying the plaintiffs' motion to set aside the judgment. To the extent that the plaintiffs' motion was brought pursuant to Rule 59(a) reliance on this section was improper, as the section permits a motion for a new trial and, here, there was no trial. To the extent that the plaintiffs sought to alter or amend the judgment pursuant to Rule 59(b), the motion, if applicable, was untimely because it was filed more than ten day after the entry of judgment. Finally, to the extent that the plaintiffs sought to set aside the judgment pursuant to Rule 60, there is no merit to their motion".

In reply first regarding Rule 59(a) & 59(b) – **there were no motions brought to set aside the judgment pursuant to Rule 59(a) or Rule 59(b)**, that is obviously ridiculous [at 12(b)(6) Level] nor are there any motions identified as such in the Dkts. There was a timely Rule 59(e) Motion – D.C.Dkt.#164 dated and filed July 24, 2000 (Attachment#16 in Circuit appeal) Titled:

"Plaintiffs Memorandum of Law in Support of their Motion for Reconsideration of Courts Ruling [Entry date July 14, 2000]" Attorney Reed [for respondent Luskin] in his memorandum in "Opposition to plaintiffs Motion for Reconsideration" identified the motion he is opposing as a "timely" "Fed. R. Civ. P. 59(e)" motion. The timely 59(e) motion was brought under the standard of (3) the need to correct multiple errors of law and to prevent manifest injustice. The Rule 59(e) motion shows more than any other docket, the multiple acts of intentional mischaracterization of facts and intentional erroneous interpretation and application of the law by the district court. It is hard to believe that circuit judges would commit such a shameful, deceptive act, crucial to the petitioners "standing" and "relief". I hope the fault of the intentional deception is that of a law clerk who should not be a law clerk.

Next in response to the last sentence of paragraph #4 (just quoted) of the circuits Summary Order regarding Rule 60.

First see copy of letter in Appendix under (i)(vi)

The "index" was never updated and I was never informed that the Circuit had a copy of the 60(b)(6) motion until the circuit Ruled –

and as I mentioned to the panel in our petition for rehearing---" it is very careless of the panel to wrongly cite a Rule 60(b)(6) motion generalized as a Rule 60 motion"---

Quote title of 60(b)(6) motion and substantive claim of motion

"Plaintiffs' Memorandum In Support of rule 60(b)(6) Motion For Relief From Judgment [Entry Date July 14, 2000] Citing Courts Abuse of Discretion and Negligence In Refusing to Identify A RICO Enterprise 18 U.S.C. 1961(4)"

Quote Substantive Claim At page 2 of 60(b)(6) motion

"Extraordinary circumstances are present i.e. the Operational Agreement with the Department of Justice and LIUNA are conspiring to hide an 18 USC 1961(4) enterprise and this Court refuses to "consider" the enterprise element. An abuse of discretion of said omission is an act of negligence causing a grave miscarriage of justice to the plaintiffs"

In addition for purposes of clarifying the pleadings – that were intentionally misrepresented by the district court and affirmed by the circuit. It was very clear, and made clear, that the petitioners did not plead 29 U.S.C. 411 and 29 U.S.C. 501(a) as predicate act

violations of RICO; They were pleaded clearly as Federal statutory rights, extorted by violations of predicate act 18 USC 1951 (Hobbs Act). 29 USC 501(a) was also properly pleaded under predicate acts 18 USC 1341-1343 mail and wire fraud. In addition to the multiple mail and wire fraud averments of petitioners Wall & Cooksey – in one scheme alone regarding petitioner Manos, 740 letters went out stating in its relevant part ---"contrary to Brother Manos wild imagination, there was no assault during the July Executive Board Meeting at Capriccio Restaurant"---

See the Supreme Courts Ruling in Badders v. United States 240 U.S.391 "Congress may enact that each putting of a letter in a post office is a separate offense". Also see (2d Cir) finding in U. S. v. Eskow 422 F. 2d 1060 Finding No. 1. "Each mailing pursuant to an alleged scheme to defraud constitutes separate offense 18 USC 1341". Now see Wall v. Local 230 224 F. 3d 168 Re-Equitable Estoppel "definite misrepresentations of fact" (not brought as mail fraud in 224 F. 3d). Brought as mail and wire fraud in this instant RICO action. Now see 3rd Cir. in United States v. Boffa 688 F.2d 919 "This court held that the RICO predicate act of mail fraud 18 USC 1341 may encompass a scheme to deprive union members of

the right to honest and faithful service of union officials as provided in Section 501 of the LMRDA"

This court can see just in the 18 USC 1341 & 1343 violations alone, in excess of 750 predicate counts a clear "abuse of discretion", "erroneous view of the law" and a clear "erroneous assessment of the evidence". And also, in support of those claims see the transcript of the tape entered in the district and the circuit with the tape. Transcript enter here in Appendix under Subdivision vi. (Petitioner Manos questioning suspicious fund expenditures).

In ending the private attorney general provision as in 1964(c) was designed to fill prosecutorial gaps – this gap is a conspiracy against TheUnited States an **OPEN POLITICAL SECRET**. The cited petitioners are three citizens of the United States harmed by "Enterprise Racketeering Injuries" Quote Sedima Supra At 498 "The statutes remedial purposes are no where more evident than in the provision of a private action for those injured by racketeering activity."

In this case, being denied our right to standing under the "**Any Person**" clause of 18 U.S.C. 1964(c) in spite of the quantity and quality of evidence presented.

Title IX's Liberal Construction / Remedial purposes clause, subsection 904(a) of R.I.C.O. has been totally eliminated here, see footnote No. 10 Relevant part Sedima Supra At 492 "Indeed, if Congress' Liberal-Construction mandate is to be applied anywhere, it is in 1964, where RICO's remedial purposes are most evident".

If this Court decides to grant certiorari, this Court will see that the remedial purposes are most evident not only for the three cited petitioners, but for the United States.

Submitted By:

GARY R. WALL
Pro se/"Counsel of Record"
60 Carriage Hill Drive
Wethersfield, Connecticut 06109
860-529-2651

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Glastonbury, Connecticut 06033
860-659-4266

SUBPARAGRAPH (i)

"At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 6th day of September., two thousand one.

PRESENT:

HON THOMAS J. MESKILL,
HON. RALPH K. WINTER,
HON. CHESTER J. STRAUB,
Circuit Judges, FILED 9/6/01

GARY R. WALL, WILLIAM COOKSEY SR, STEPHEN MANOS,

Plaintiffs-Appellants,

SUMMARY ORDER
NO. 00-9004

v.

HARRIET ROMAN,

Defendant,

ROBERT M CHEVERIE, CHARLES LECONCHE, DOMINICK LOPREATO, Trustee, JOHN PEZZENTE, LABORERS INTERNATIONAL UNION OF NORTH AMERICA, VERE O. HAYNES, ROBERT D. LUSKIN, MICHAEL S. BEARSE, General Counsel LIUNA, FRANK FREEMAN, LABORERS' LOCAL 230,

A1

Defendants-Appellees,

Appearing for Appellants:	Gary R. Wall, Wethersfield, CT., *pro se*; William Cooksey, Sr., Hartford, CT, *pro se*; Stephen Manos, Glastonbury, CT.*pro se*.

Appearing for Appellee:	Robert M. Cheverie, Cheverie & Associates (John T. Fussell, on the brief), East Hartford, CT.
Appearing for Appellee Robert D. Luskin	Terrence G. Reed, Alexandria, VA

Appeal from the United States District Court for the District of Connecticut (Janet C. Hall, Judge)

AFTER ARGUMENT AND UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGE AN DECREED that the orders of the District Court are hereby AFFIRMED.

Plaintiffs-Appellants Gary R. Wall, William Cooksey, Sr., and Stephen Manos, *pro se*, appeal from orders of the United States District Court for the District of Connecticut (Janet C. Hall, *Judge*), dismissing their complaint pursuant to Fed. R. Civ. P. 12(b)(6), denying

their motion to set aside the judgment, and denying their motion for leave to amend their complaint.

The facts giving rise to this action are described in this Court's opinion in *Wall v. Construction & General Laborers' Union, Local 230*, 224 F. 3d 168(2d Cir. 2000). The plaintiffs filed a second amended complaint pursuant to the Racketeer Influenced and Corrupt Organizations Act ("RICO") alleging violations of the civil remedy provisions of RICO, 18 U.S.C. 1964(c), and arguing that the defendants had deprived the plaintiffs of intangible property rights, including the rights to union membership, employment, and due process, and the right to vote in union affairs, as well as entitlement to their pensions. The defendants moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) and the plaintiffs moved to amend the

Complaint. In July 2000, the District Court granted the motion to dismiss and denied the motion to amend. The District Court concluded that the plaintiffs had failed to establish the existence of two predicate acts required to demonstrate a RICO violation and, as such, there was no need to address the remaining elements of a RICO claim. In dismissing the complaint, the court noted that, in light of the practice of broadly construing *pro se* complaints, it has repeatedly informed the plaintiffs of RICO pleading requirements and had given the plaintiffs numerous opportunities to replead and resubmit facts showing the existence of predicate acts, to no avail. As to the procedural due process claim against defendant Robert D. Luskin, the District Court found that liability did not attach because of the plaintiffs had not alleged that Luskin was a Department of Justice employee or that he acted at the direction of the Department of Justice. However, the District Court granted the plaintiffs leave to amend with respect to this claim. Additionally, the District Court denied the plaintiffs' requests to add an equal protection

claim against Luskin, to add Gene Julian as a defendant, to clarify, and for further discovery.

After judgment was entered, the plaintiffs filed a motion for reconsideration, arguing, *inter alia*, that the District Court had "made unreasonable departures from well founded precedents and findings of the Circuits and U. S. Supreme Court" regarding RICO violations and that such departures constituted an abuse of discretion. Thereafter, the plaintiffs filed a notice of appeal and later moved to amend their complaint. The District Court denied the motion to amend in light of the pending appeal in the Court. The defendants filed a motion to dismiss the plaintiffs' amended complaint, which the District Court also denied for lack of jurisdiction. The District Court later denied the reconsideration motion.

We review *de novo* a district court's dismissal of claim pursuant to Fed. R. Civ. P. 12(b)(6). See *Cooper v. Parsky*, 140 F.3d 433,440(2d Cir. 1998). We "tak[e] all factual allegations as true and constru[e] all reasonable

inferences in the plaintiff's favor." *Lee v. Bankers Trust*, 166 F.3d 540, 543 (2d Cir. 1999). A district court denying a motion for relief from a final judgment pursuant to Fed. R. Civ. P. 60(b) is reviewed for abuse of discretion. *See Transaero, Inc. v. La Fuerza Aerea Boliviana*, 162 F. #d 724, 729 (2d Cir. 1998), *cert. Denied*, 526 U. S. 1146 (1999). "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Id.*

The District Court properly dismissed the RICO complaint based on its conclusion that the plaintiffs had not established the elements of RICO claim. While the District Court's order did not specifically address the plaintiffs' allegations with respect to defendant Vere O. Haynes, a review of the claims against him reveals that they also fail sufficiently to allege predicate acts for purposes of RICO.

Further, the District Court was correct in denying the plaintiffs' motion to set aside the judgment. To the

extend that the plaintiffs' motion was brought pursuant to Rule 59(a), reliance on this section was improper, as the section permits a motion for a new trial and, here, there was no trial. To the extent that the plaintiffs sought to alter or amend the judgment pursuant to rule 59(b), the motion, if applicable, was untimely because it was filed more than ten days after the entry of judgment. Finally, to the extend that the plaintiffs sought to set aside the judgment pursuant to Rule 60, there is no merit to their motion.

We now turn to the District Court's denial of the plaintiffs' request to amend their complaint with regard to their due process claims against defendant Luskin. The District Court initially gave the plaintiffs thirty days from July 11, 2000, the date of its dismissal of the complaint, to replead their claims against Luskin. However, the court improperly entered judgment on July 14, 2000, three days after the date of the dismissal. Thus, the plaintiffs' notice of appeal, filed on July 31, 2000, was an appeal from a non

final order, because the thirty-day period for repleading had not yet expired. Nonetheless, we hold that the District Court's judgment dismissing the case became final on August 10, 2000, thirty days from its initial dismissal, and we construe the plaintiffs' appeal as being from the final judgment. *See Festa v. Local 3 Int'l Bhd. of Elec. Workers*, 905 F. 2d 35, 37 (2d Cir. 1990) ("[S]ince the deadline imposed by the district court for amendment has passed, we will treat the present appeal as having been timely filed after the dismissal by the district court became final.") We accordingly have jurisdiction to consider the issue. We find that the District Court properly denied the plaintiffs' motion to amend, because that motion was ultimately filed on August 22, 2000, more than thirty days after the court's July 11 dismissal.

We have considered the appellants' remaining arguments and find them to be without merit. For the reasons set forth above, we AFFIRM the judgment of the District Court.

FOR THE COURT:
ROSEANN B. MACKECHNIE, CLERK

A 8

Signed by: Lucille Carr 9/6/01

SUBPARAGRAPH (ii)

"UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GARY R. WALL,
WILLIAM COOKSEY SR
STEPHEN MANOS

JUL 14 12:43 PM '00
FILED

v.

3:97CV2502 JCH

ROBERT LUSKIN, VERE O HAYNES,
MICHAEL S. BEARSE, LABORS LOCAL 230,
LABORERS' INTERNATIONAL UNION,
DOMINICK LOPREATO, JOHN PEZZENTE,
CHARLES LECONCHE, ROBERT CHEVERIE,
HARRIET ROMAN, FRANK FREEMAN,
LUSKIN/COIA/LOPREATO GROUP,
"L.C.L" THE ENTERPRISE

JUDGMENT

This matter came on before the Honorable Janet C. Hall, United District Judge, as a result of defendants' motions to dismiss.

The Court has received all of the papers filed in conjunction with the motion and hear oral argument. On July 12, 2000, a Ruling on Pending Motions entered granting the defendants' Chevrie, et al motion to dismiss

with prejudice except that it is without prejudice as to the due process claim only.

Therefore, it is ORDERED and ADJUDGED that judgment is entered for the defendants and the case is closed.

Dated at Bridgeport, Connecticut, this 14th day of July, 2000.

KEVIN F. ROWE, Clerk
By: Chrystini Cody
Deputy-in-Charge

Entered on Docket_____"

SUBPARAGRAPH (iii)

"United States Court of Appeals
for the Second Circuit
United States Court House
40 Foley Square
New York 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 15th day of November two thousand one.

_____
Wall

v. Dkt No. 00-9004

Cheverie Filed 11/15/01 2d Cir

A Petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellants Gary R. Wall, William Cooksey Sr., and Stephen Manos,

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ROSEANN B. MACKENCHNIE, Clerk

By: Arthur Heller
Administrative Attorney

Nov 15 2001"

SUBPARAGRAPH (iv) N/A

SUBPARAGRAPH (v)

"C. NATURE OF THE CASE

This action is against an enterprise 18 U.S.C. 1961(4) and the entities that are part of the enterprise 18 U.S.C. 1961(3) and the defendant person's 18 U.S.C. 1961(3) that are associates of said enterprise. For substantive violations of 18 U.S.C. 1962(b)(c)(d), 18 U.S.C. 1961(1)(5) from October 15, 1970 "effective date RICO enterprise".

A11

Racketeering injury's in the meaning of 18U.S.C. 1961 (5) starting 1985 and continuing on by and through the "Operational Agreement" February 13, 1995 to present day, with no determinable completion date.

D. CAUSE OF ACTION

The plaintiff allege that the following constitutional right and privileges have been violated. Our intangible property rights, LMRDA membership rights, our employment rights, our rights to self-determination, as provided by the LMRDA and our constitutional right of due process.

CLAIM 1: The plaintiffs allege that the following Federal Statutes have been violated 18 U.S.C.1962(b)(c)(d), 18 U.S.C.1961(1)(5) 18 U.S.C. 1951, 18 U.S.C. 1951(b)(2), 18 U.S.C. 1341, 18 U.S.C.1343, 18 U.S.C.2, 18 U.S.C. 1512, 29 U.S.C. 411, 29 U.S.C. 401, 29 U.S.C. 530, 29 U.S.C. 501, 18 U.S.C. 1959 in the Control and Maintenance of 18 U.S.C. 1961(4)."

SUBPARAGRAPH (vi)

l. Copy of January 17, 2001 letter address to Appeals Clerk United States District Court 915

A12

Lafayette Boulevard, Bridgeport, Connecticut 06604 from Gary R. Wall regarding the non entry of D.C. Dkt. #178 RE: 60(b) motion.

2. Copy of transcript of tape July 30, 1997 D.C. Dkt.#29 Appellate Attachment #4 29 U.S.C. 530 assault with multiple Hobbs Act violations committed against and on Petitioner Stephen Manos in his capacity as an individual and Vice President of Laborers' Local 230.

A 13

January 17, 2001

Appeals Clerk
United States District Court
915 Lafayette Boulevard
Bridgeport, Connecticut 06604

RE: Case No. 3:97:CV 02502 (JCH)

Dear Ms. Warren:

In preparing my appeal in 397CV02502(JCH) due February 5, 2001, I noticed that the Index of the Record on Appeal stops at District Court Docket #177. The District Court Dockets run to dockets number 181. Docket #178 is an important docket. It is a Rule 60(b)(6) motion. Would you please send a corrected record to the Second Circuit and the parties listed below.

Thank you.

Gary R. Wall, Pro Se
60 Carriage Hill Drive
Wethersfield, Connecticut 06109
860-529-2651 860-563-5915

c: United States Court of Appeals
Ms. S. Washington – Goeloc
United States Court House
40 Foley Square
New York, New York 10007

Mr. John T. Fussell
Robert M. Cheverie Associates
333 East River Drive
East Hartford, Connecticut 06108-4201

Mr. Terrence G. Reed
120 N. Street Asaph Street
Alexandria, Virginia 22314

Transcript : July 30, 1997 Assault on Stephen Manos

Those heard on tape :

Stephen Manos, Vice-President—SM
Charles LeConche, Business Manager—CL
Ted Grabowski President—TG
Wayne Silva, Executive Board—WS
Restaurant Owner [Joseph or John Fuschi]—JF
Frank Freeman, Sergeant-at-Arms [Drinking in bar]—FF
William LeConche, Brother of Charles LeConche [Drinking in Bar]—WL

Those also present :

Leonard Granell Jr., Recording-Secretary
John Pezzenti, Secretary-Treasurer
James Lawson, Executive Board
Don Douville, Auditor
Lloyd Lecky, Auditor
William Del Gaizo, Auditor
Thomas Brockett, Attorney [Cheverie & Associates]
Vere Haynes, Vice President, Laborers International Union of North America

SM : Now. This ad. It cost eleven thousand ?
CL : What ad ?
SM : For the Times [New York Times]
CL : Yeah
SM : Do you know if there were any other set-up costs involved ? What was the total amount ?
CL : That's it.
SM : Eleven grand. O.K. Now....
CL : That's none of your business
SM : Why isn't it any of my business ?
CL : That's a <u>District Council</u> matter.
SM : It's still my money. My dues are paying for that.
CL : That's a <u>District Council</u> matter, approved by the delegates elected by the.....
SM : What was the vote, by the way ? Was it unanimous ?
CL : One "No".
SM : Yeah. Who?
CL : Ron Nobili.
SM : Oh, the guy you ostracized.
CL : Ostracized!

Transcript : July 30, 1997 Assault on Stephen Manos

TG : I don't think.....I don't think that this is the platform for District Council matters.
SM : It's a platform for my dues.
CL : You don't belong.....
SM : My dues that I pay.
CL : Why'd you call Ted Grabowski & try to solicit a vote against John Silva, Asshole !
SM : Because I'm a member & I have a right...I have a right to lobby.
CL : You don't have a right...
SM : I got a right to lobby
CL : You haven't got the right to Fuckin' do anything with the Council.
SM : O.K. Fine.
CL : And stay the Fuck out of my business !
SM : That comes.....Hey !
CL : Stay the Fuck out of my business!
SM : That comes.....That'll come later.
CL : Steve, you're about that Fuckin' close for me ripping your Fuckin' throat out personally !
CL : Fuck the.....!
SM : Don't threaten me !

[LeConche (standing) violently throws a napkin, striking Manos (seated) in the chest.]

Wayne Silva [to LeConche] : Hey! Hey! Watch it !
CL to SM : Fuck you !
SM : Don't threaten me !
CL : Fuck you! It ain't a threat. It's a Fuckin' promise!
SM : What did you say ?

[The enraged LeConche rushes towards Manos but is restrained by two Union officials.]

CL : You heard me! Cocksucker ! Cocksucker ! You Fuckin' heard me!

[Manos is attacked from his blind-side by Sergeant-at-Arms Frank Freeman & thrown violently backward over a wrought iron dining chair onto the ceramic-tile concrete floor.]

SM : Hey! Hey!

[Furniture is overturned as Freeman strikes Manos & the injured Manos gasps/moans.]

FF : Come on! Come on!
SM : Help me up Frankie.
FF : Out! Come on!
SM : Wait!..... Let me get my stuff! Let me get my stuff! I want to get.....! All right.

Transcript : July 30, 1997 Assault on Stephen Manos

[Freeman grabs & pulls Manos & prevents him from retrieving his personal belongings.]

FF : Somebody else will get your shit!

JF (restaurant owner), [unlocks side door] ***: No , no wait! Let me open...I open for you. I open for you. Just lock the door. All right?***

[Freeman throws Manos into street through side entrance doorway & closes the door.]

FF : Get the Fuck out!

SM [standing in street & speaking through the closed glass door] ***: Can I get my stuff ?***

[William LeConche & Charles LeConche run out of main door of restaurant & pursue Manos in the street as Freeman follows & intervenes.]

WL : What are you doing ? You going after my brother ? You going after my brother?
WL : You piece of shit!
SM : Get him off me Frank.
WL : You piece of shit!
CL : Get the Fuck out.....you cocksucker!
FF : All right Charlie!
CL : You better get out of here.....!
FF : All right!
SM : Get me to my car! Get me to my car!
WL : My brother....
CL :Your car...You Fuckin' piece of shit!
WL : You say something to my brother you asshole!
FF : Where's your car ?
SM : Right there. Right there!
WL : Don't you ever talk to my brother! You hear me?
Unknown : Hey Jimmy! Where's your car ?
FF : Get in your car.
SM : O.K. Frank. Thanks Frank.
CL : Do yourself a favor. Don't show up for a while! We own you now you Fucker!
WL : You talk to my brother again you got problems!

[Manos flees in his car, immediately makes a complaint in person to a police officer, & returns to his home to be personaly greeted by LIUNA IG Investigator **Sheryl McLaughlin**, & then goes to *Manchester Memorial Hospital Emergency Room* for treatment.]

Supreme Court, U.S.
FILED

011401 FEB - 8 2002

OFFICE OF THE CLERK

NO._____

SUPREME COURT OF THE UNITED STATES

In Re GARY R. WALL, WILLIAM COOKSEY SR, STEPHEN MANOS
Petitioners
v.

ROBERT M. CHEVERIE, CHARLES LECONCHE, DOMINICK LOPREATO, TRUSTEE, JOHN PEZZENTE, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, VERE O. HAYNES, ROBERT D. LUSKIN, MICHAEL S. BEARSE GENERAL COUNSEL LIUNA, FRANK FREEMAN LABORERS' LOCAL 230
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR WRIT OF CERTIORARI
SUPPLEMENTAL APPENDIX

SUBMITTED BY:
Pro se "Counsel of Record"
GARY R. WALL
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Wethersfield, CT. 06109
860-529-2651

WILLIAM COOKSEY, SR
Pro se
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Hartford, CT. 06114
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STEPHEN MANOS,
Pro se
77 Hale Road
Glastonbury, Connecticut 06033
860-659-4266

54 M

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GARY WALL, WILLIAM COOKSEY, STEPHEN MANOS
Plaintiffs,

v.

CIVIL ACTION NO:
3:97CV02502(JCH)

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, Etal.,
Defendants,

July 11, 2000

RULING ON PENDING MOTIONS

I. PROCEDURAL HISTORY & MISCELLANEOUS MOTIONS

This case is an action by pro se plaintiffs Gary R. Wall, William Cooksey, Sr., and Stephen Manos against the Laborers' International Union of North America ("LIUNA"), Laborers' Local Union 230, Michael Bearse, Robert Cheverie, Frank Freeman, Vere O. Haynes, Charles LeConche, Robert Luskin, Dominick Lopreato, John Pezzente and Harriet Roman. Over the past two and a half years, several prior versions of the complaint have been filed, and several motions to dismiss made and ruled on. See Dkt. No. 30 (granting Dkt. No. 15 motion to dismiss): Dkt. No. 58 (denying Dkt. No. 55 motion to dismiss); Dkt. No. 97 (granting Dkt. No. 69 motion to dismiss, Dkt. No. 1(Complaint);

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Dkt. No. 59 (Amended Complaint);Dkt. No. 99 (Second Amended Complaint). In addition, parties on both sides have been added by the plaintiffs. See Ruling, September 24, 1998 [Dkt. No. 58]; Endorsement Granting Motion to Add Two New Defendants [Dkt. No. 102].

The complaint presently before the court is Docket No. 99, the Second Amended Complaint. The plaintiffs have filed two motions seeking leave to amend the complaint further to include a new plaintiff, Gene Julian, and to expand on their allegations against defendant Luskin. See Dkt. No. 123; Dkt. No. 145. All of the defendants, with defendant Luskin filing separately, have now moved to dismiss the Second Amended Complaint for failure to state a claim pursuant to Federal rule of Civil Procedure 12(b)(6). See Dkt. No. 105 (Defendants' Motion to Dismiss); Dkt. No. 109 (Defendant Luskin's Motion to Dismiss).

The plaintiffs, in response, moved for a hearing on the motion to dismiss pursuant to Fed. R. Civ. P. 12(d). See Dkt. Nos. 107 and 115. Oral argument was held on the two motions to dismiss and two motions to amend on June 19, 2000. Thus, the relief sought by the plaintiffs' motions for a hearing has been

granted, and the motions will be deemed granted. Similarly, the defendants had moved to stay discovery pending a ruling on their Motion to Dismiss. See Dkt. No. 130. Since the court is now issuing a ruling on the motion to dismiss, the motion for a stay is denied as moot.

Following oral argument, the plaintiffs filed a "Motion Requesting Right to Clarify the Pleadings Pursuant to Rule 14(C)(1)(2) F.R.C.P. in Response to Oral Argument Dated June 19, 2000" [Dkt. No. 55]. The court will now consider the pending motions to dismiss with respect to the existing Second Amended Complaint, then turn to consideration of whether any further amendments will be permitted, and finally address the Motion Requesting Right to Clarify.

II. MOTIONS TO DISMISS

A. STANDARD

When considering a Rule 12(b)(6) motion to dismiss, the court must accept as true all factual allegations in the complaint and draw all inferences from those allegations in the light most favorable to plaintiff. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). The issue is not whether plaintiffs will ultimately prevail

on their claims, but only whether they are entitled to offer evidence in support of them. Id. Dismissal is warranted only if it is clear that no relief can be granted under any set of facts the plaintiffs can prove consistent with their allegations. Hisbon v. King & Spaulding, 467 U. S. 69, 78 (1984).

Nevertheless, it is also well established that "[w]hile the pleading standard is a liberal one, bald assertions and conclusions of law will not suffice." Leeds v. Meltz, 85 F.3d 51, 53 (2d Cir. 1996). A plaintiff must make "the necessary factual averments. . . with respect to each material element of the underlying legal theory" in order to avoid dismissal under Rule 12(b)(6). Fleming v. Lind-Walcock & Co. 922 F.2d 20, 24 (1st Cir. 1990). In considering the sufficiency of a pro se complaint, the court must "construe it liberally, applying less stringent standards than when a plaintiff is represented by counsel." Branham, 77 F. 3d at 628-29 (quoting Robles v. Couglin, 725 F.2d 12, 15 (2d Cir. 1983)).

As a preliminary matter, the court notes that the Second Amended Complaint incorporates by reference the plaintiffs' submissions in compliance with the District of Connecticut's Standing Order on Civil RICO Cases, as well as the affidavits of

Judith Dobrich and Stephen Manos. See Dkt. No. 37; Dkt. No. 52; Dkt. No 100, Dkt No. 101. Therefore, in keeping with the Second Circuit's admonition to construe pro se complaints broadly, the court has reviewed and considered all of these filings in deciding the defendants' motion to dismiss.

B. RICO

The Second Amended Complaint seeks to allege a cause of action under the civil remedy provisions of the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. 1964(c). Second 1964(c) of the United States Code allows "[a]ny person injured in his business or property" because of commission of "prohibited activities" under section 1962 to bring suit in federal court. If such a plaintiff prevails, he may recover threefold any damages sustained, as well as attorneys' fees and costs.

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The plaintiffs allege that they have been deprived of their "Intangible property rights," their right to union membership, their right to employment, the right to vote in union affairs, their due process rights, and their pensions, on account of violations of section 1962(b),(c) and (d).[1] See Second Amended Complaint at 4

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[1] Section 1962(b) states:

It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce 18 U.S.C. 1962(b).

Section 1962(c) states:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of collection of unlawful debt. 18 U.S.C. 1962 (c).

Section 1962(d) prohibits conspiracy to violate any of the other subsections of Section 1962. 18 U.S.C. 1962(d).

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(stating rights and privileges alleged to be violated); Re-pleading of Second Amended Complaint at 6 (describing depletion of plaintiffs Wall and Cooksey's pensions); Standing Order [Compliance], Dkt. No. 37 at 28 (Complaint does not allege a violation of 18 U.S.C. 1962(a).").

Common to both sections 1962(b) and (c), and thus indirectly to section 1962(d) as well, is the phrase "pattern of racketeering activity." Thus, in order to allege a cause of action under any of the civil RICO provisions, the plaintiffs must allege facts that, if proved to be true, would constitute a pattern of racketeering activity.[2] See 18 U.S.C. 1962.

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[2] The plaintiffs contend that this court erred in failing to discuss the nature of the "enterprise" alleged by the plaintiffs in its prior Ruling dated July 29, 1999 [Dkt. No. 97]. See Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Hearing [Dkt. No. 108] at 3(discussing "the Court[']s oversight of the enterprise element in the Court's July 29, 1999 ruling, which was a grave error on the part of the Court"). The plaintiffs state that "[T]here is one thing this pro se understands about RICO concerning Justice; That is: If you can't plead 18 U.S.C.

To show a pattern of racketeering activity, the plaintiffs must plead "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter [October 15, 1970] and the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity." 18 U.S.C. 1961(5). In addition, civil RICO actions have a four year statute of limitations, such that the most recent act in the "pattern" must have

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1961(4) 'enterprise' then you can't plead racketeering injury . . . . "See Plaintiffs Response Motion to Court's "Ruling on Defendants' Motion to Dismiss," attached to Second Amended Complaint.

The plaintiffs are correct that the existence of an "enterprise" is an integral part of a RICO action, but it is not the only requirement under RICO. The curt understands the defendants' argument to be that, even if the court were to assume that such an enterprise did exist, the plaintiffs have nevertheless failed to meet other requirements of alleging a cause of action under RICO – specifically, the defendants argue, the plaintiffs have not alleged a pattern of racketeering activity. Because allegations of a pattern of racketeering activity are a required part of a RICO action based on 18 U.S.C. 1962(b), (c) and (d), the curt must examine whether the plaintiffs have alleged sufficient facts to meet this enterprise, as the plaintiffs suggest. If they have not alleged sufficient facts to meet the "pattern" requirement, however, then the court would not reach the "enterprise" issue and must dismiss the plaintiffs' complaint for failure to state a claim.

occurred within four years of the commencement of the lawsuit.[3] See Agency Holding Corp. v. Malley-Duff & Assoc. Inc. 483 U. S. 143, 156; 107 S. Ct. 2759, 2767 (1987).

The plaintiffs must also allege how the predicate acts are related, and that they amount to, or pose a threat of, continuing criminal activity. See GICC Capital Corp. v. Technology Finance Grp. Inc., 67 F. 3d 463, 465 (2d Cir.. 1995). Finally, the plaintiffs must allege that they were harmed in their property or business by reason of such a pattern of racketeering activity. See 18 U.S.C. 1964(c).

The court must therefore first determine whether the plaintiffs have alleged at least two related predicate acts of racketeering activity within ten years of each other and at least one of which occurred after December 1, 1993. The RICO statute defines "racketeering activity" and details what acts are considered "predicate acts" for RICO purposes. See 18 U.S.C. 1961(1). Of these, the plaintiffs appear to have attempted to allege violations of the mail and wire fraud statutes (18 U.S.C. 1341 and 1343); 18

[3] This lawsuit was commenced by the filing of the original Complaint on December 1, 1997.

U.S.C. 1512(tampering with a witness, victim or informant); violation of the Hobbs Act (18 U.S.C. 1951); and 29 U. S. C. 501(c) (fiduciary responsibilities of labor organization officers; embezzlement of union funds). See Second Amended Complaint at 5.

The plaintiffs additionally cite 18 U.S.C. 2 (aiding and abetting liability); 29 U.S.C. 401 (congressional policy statement for the Labor-Management Reporting and Disclosure Act ("LMRDA")); 29 U.S.C> 411 (bill of rights of members of labor organizations)' 29 U.S.C. 530 (deprivation of union rights by violence or threat of violence); and 18 U.S.C. 1959 (commission of violent crimes in furtherance of racketeering activity).[4]

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[4] The plaintiffs actually cite 29 U.S.C. 1959, see Second Amended Complaint at 5, but no such statute exists, so the court has assumed the plaintiffs intended to refer to 18 U.S.C. 1959 (commission of violent crimes in furtherance of racketeering activity), particularly in light of the plaintiffs' allegations elsewhere in their pleadings that an assault was committed in an effort to maintain control of Local 230.

See Second Amended Complaint at 5. However, none of these are included as "predicate acts" under the civil RICO statute, and therefore, may not be considered in support of the plaintiffs' cause of action.

Turning tot he predicate acts the plaintiffs claim to allege, the court must determine whether the plaintiffs have alleged facts that, if proven, would meet the elements of the predicate offenses.

1. MAIL AND WIRE FRAUD

In order to allege a violation of the mail or wire fraud statutes, 18 U.S.C. 1341-1343, the plaintiffs must comply with the requirements of Federal Rule of Civil Procedure 9(b), which requires the allegations of fraud be stated with particularity. In the RICO context, this means the plaintiffs must "specify the statements [they] claim[] were false and misleading, give particulars as to the respect in which plaintiffs contend the statements were fraudulent, state when and where the statements were made, and identify those responsible for the statement." Moore v. Painewebber, Inc. 189 F.3d 165, 173 (2d Cir. 1999) (quoting McLaughlin v. Anderson, 962 F. 2d 187, 191 (2d Cir.

1992)). The plaintiffs must also identify the "purpose of the mailing within the defendant's fraudulent scheme," see Moore, supra, 189 F.3d at 173, and "allege facts that give rise to a strong inference of fraudulent intent." Id. (quoting San Leandro Emergency Med. Group Profit Sharing Plan v. Philip Morris Cos., 75 F.3d 801, 812, (2d Cir. 1996)). Even if the plaintiffs meet the Rule 9(b) requirements in other respects, their claims must be dismissed if they fail to allege how the statements are fraudulent. See Anatian v. Courts Bank (Switzerland) Ltd. 193 F.3d 85, 88 (2d Cir. 1999).

The court must therefore evaluate each of the alleged fraudulent statements described by the plaintiffs to see if the plaintiffs' allegations meet this standard.

a. Michael Bearse

The plaintiffs state that "Mr. Bearse is being charged with multiple counts of mail fraud . . . the exact dates of all the frauds we are not able to give yet because of the fraudulent concealment of the protective order issued by the NLRB . . . ." Second Amended Complaint at 6. The plaintifs further state that the "without discovery [or filing of a Freedom of Information Act

request with the NLRB] the plaintiff[s] cannot meet the requirements of Standing Order 5(c) under F.R.C.P. 9(b). . . ." Standing Order [Compliance] at 20-21. Given the plaintiffs' admission that they cannot presently meet the pleading requirements of Rule 9(b) with respect to any statements made by defendant Bearse to the NLRB, the court cannot find that any such statements could be considered "predicate acts" for RICO purposes.

The plaintiffs also allege that Bearse committed mail fraud on October 6, 1997 in affidavit filed in another case brought by the same plaintiffs against substantially the same defendants. See Wall v. Construction & Gen. Laborers' Union, Local 230 Civil No. 3:97-CV-942 (D. Conn.) (hereinafter the "942 case"). The plaintiffs state that "Mr. Bearse makes deliberate misrepresentations of readmission practices of Local 230 conspiring with the enterprise to stop Plaintiff[s] Wall and Cooksey from meeting membership requirements." Re-Pleading of Second Amended Complaint at 18; see also Standing Order [Compliance] at 20. The plaintiffs have identified the speaker, the statement, and the place and date of the statement. Their

allegations could be construed as stating that the purpose of the mailing was to mislead the court in order to harm the plaintiffs. However, they have not explained how the statements contained in the affidavit are fraudulent. The plaintiffs have only alleged generally that the statements are false; they have not alleged any facts that would support that conclusion.[5] Similarly, the plaintiffs have not alleged any specific facts that could give rise to a "strong inference of fraudulent intent." Moore, supra, 189 F.3d at 173. The plaintiffs allege generally that Bearse is involved in a conspiracy to keep the plaintiffs out of Local 230, but do not allege any facts that would allow a jury to conclude that, even if such a conspiracy existed, Bearse was a part of it. The court cannot assume from Bearse's position as Regional Attorney for LIUNA that he therefore knew of and is liable for any wrongdoing in which other defendants in this case may have engaged. Therefore,

[5] For example, the plaintiffs have not alleged that the readmission procedure described in the Bearse Affidavit was not in fact the readmission procedure in

the plaintiffs have not pled their mail and wire fraud charges against defendant Bearse and with sufficient particularity.

b. Dominick Lopreato

The plaintiffs allege that, "[s]ince October 15, 1970, Mr. Lopreato has committed multiple predicate acts of . . . mail fraud and wire fraud . . . in the furtherance of an enterprise" Second Amended Complaint at 7. The plaintiffs contend that Lopreato systemically attempted to keep Wall and Cooksey out of the union, presumably because, as the plaintiffs discuss early in their complaint, the plaintiffs were outspoken critics of the union leadership.

The specific acts of mail fraud cited by plaintiffs are three letters dated April 28, 1992, August 25, 1993 and March 7, 1995, from Lopreato to the plaintiffs, in which Lopreato stated that Local 230 would not accept new members unless there were work opportunities available, that there were no referral opportunities available at that time, and that the plaintiffs were welcome to register for referral at any time. See Attachments to Exh. J. to

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place as of October 6, 1997, and the plaintiffs have not alleged that some other readmission procedure was the correct one.

Standing Order [Compliance]. The plaintiffs allege that these letters were fraudulent because Local 230 did take in new members during this time period and yet continued to deny the plaintiffs readmission. See Exh. J to Standing Order [Compliance] at 3.

Here, the plaintiffs have attempted to explain why they think the statements are fraudulent, namely, because the letters state that no referral opportunities were available that would allow more people to become new members, and yet more people were becoming new members. However, the plaintiffs do not allege that any of the new members were in a similar position as themselves. If the plaintiffs were not in a similar position as other candidates, then the fact that other individuals were admitted to Local 230 while they were not has no significance in terms of the plaintiffs' fraud allegations.[6] That is, no trier of fact could reasonably infer,

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[6] In fact, at oral argument, plaintiffs conceded that plaintiff Cooksey became ill before his "number came up" on the referral list, so he clearly was not denied a referral or a spot on the referral list for a discriminatory purpose. Further, the letters concern the availability of job referrals, not admission to the union, and plaintiff Wall similarly conceded at oral argument that he was allowed to register for referral and did so, and eventually was referred out to a job.

without more, that the letters were fraudulent from the sole fact of the denial of plaintiffs' readmission to the union. Therefore, since the plaintiffs have not adequately pled facts that either explain how the statements are fraudulent or give rise to an inference of fraudulent intent, the court has no choice but to dismiss these claims as well.

c. John Pezzente and Charles LeConche

For both Pezzente and LeConche, the plaintiffs cite two letters, dated January 5, 1996 and January 9, 1996, and essentially argue that, because the two letters appear to contradict one another, at least one of them must be fraudulent. The first letter is to plaintiff Wall and states that non-members may sign the referral list, but that Wall may be a "barred individual" under the LIUNA Ethics Code and may therefore not be eligible for membership. The second letter is to plaintiff Cooksey and similarly states that non-members may sign the referral list, but notes that "employment under our collective bargaining agreement does not make you a member." See Attachments to Exh. J. to Standing Order [Compliance] [Dkt. No. 37]. The plaintiffs allege that this represents a "change in policy" and that it was made because Wall

as "getting close to getting a job." See Exh. J. at 3. The plaintiffs further state that Wall was referred to a job shortly thereafter, but was not allowed readmission. See id.

However, yet again, the plaintiffs do not allege facts that would show why either of the two statements are false. Neither letter states or even implies that getting a job referral would automatically result in readmission. To the contrary, the letter to plaintiff Cooksey specifically notes that getting a job referral does not mean automatic membership. Conversely, neither letter states that the plaintiffs would necessarily be denied readmission. Rather, the letters suggest a course of action to the plaintiffs and attempt to explain to the plaintiffs what may or may not occur as a result of following that course of action. The plaintiffs do not allege any facts to support their contention that LeConche and Pezzente intended to defraud the plaintiffs, other than, again, their general allegations of conspiracy against the plaintiffs. Thus, the plaintiffs have not alleged facts sufficient to meet the requirements of Rule 9(b) with respect to the LeConche/Pezzente letters.

The plaintiffs further contend that the two letters are evidence that LeConche's affidavit, filed in the 942 case, in which

he stated that the plaintiffs never tried to join the union but only wanted to be readmitted on their old books, was a fraud. See Exh. J. to Standing Order [Compliance] at 4. As stated above, the letters are clear in stating that the plaintiffs could work, assuming jobs were available, but were not guaranteed readmission and, further, that if the plaintiffs were readmitted, they might have to participate in a LIUNA ethics hearing. The plaintiffs have not explained how any of these statements are false, or misrepresent anything about LIUNA's admission policies. Nor have they alleged any facts --for example, facts surrounding their own, actual efforts to seek readmission - - that would allow the court to infer that the statement was false.[7]

[7] When asked at oral argument to explain how the statements were false, plaintiff Wall stated that it was because the union would not let him back in. The fact that the union denied him readmission is not inconsistent with anything in the letters or affidavit.

Thus, the plaintiffs have again failed to meet the requirements of Rule 9(b).

d. Robert Cheverie

The plaintiffs have identified two grounds on which defendant Cheverie is allegedly liable for mail and wire fraud. One is an April 9, 1996 letter from Robert Cheverie to Robert Lill in the Office of the Inspector General, and the second is that he allegedly instructed defendants Roman and LeConche to file fraudulent affidavits and is therefore indirectly liable for mail fraud. See Exh. J. to Standing Order [Complaince] at 5.

With respect to the April 9, 1996 letter, the plaintiffs allege that the passage "finally, the brutal beating of John Pezzente at his home two days after Christmas is undoubtedly linked to Mr. Wall's criminal associations. In this regard, Wall was observed by Pezzente in the presence of Grasso shortly before the beating occurred" was fraudulent, and that it constitutes both mail and wire fraud because the letter was evidently both mailed and faxed. See Second Amended Complaint at 14-15. The plaintiffs contend that the 1996 letter was fraudulent because it inaccurately implicated

Wall, Cooksey and William Grasso in a 1985 assault on John Pezzente. To this end, the letter allegedly also relies on the inaccurate statements of John Pezzente in a statement to the police in which he described seeing Wall nearby with a car matching the description of Wall's wife car. Wall contends that the statement had to be false because Wall's wife's car had been stolen several months prior to the date in question. See Exh. J. to Standing Order [Compliance] at 6. He further contends that Pezzente himself admitted that it was a false statement in a later deposition. See Re-Pleading of Second Amended Complaint at 14. The plaintiffs allege that the April 9, 1996 letter "was meant to create an intolerable and unsafe atmosphere in the union, workplace and the street directed at Plaintiff Wall and Plaintiff Cooksey." Standing Order [Compliance] at 16 [Dkt. No. 37].

However, the plaintiffs again fail to allege any facts on which the court could rely in concluding that the April 9, 1996 letter was written with fraudulent intent. In fact, the plaintiffs seem to take the position that the 1996 letter was written in reliance on the 1985 police report, which included an early (allegedly false) statement by Pezzente with respect to Wall's car.

Assuming the 1985 police report was incorrect, the plaintiffs provide no factual basis for concluding anything other than that Cheverie adopted the police report as accurate when he composed the April 9, 1996 letter. There are no specific facts alleged from which the court could conclude that the April 9, 1996 letter was knowingly false or from which the court could infer the requisite fraudulent intent on Cheverie's part.[8]

e. Harriet Roman

At oral argument, the plaintiffs stipulated to the withdrawal of Harriet Roman as a defendant. Since acts must be committed by a defendant to be considered predicate acts, and Roman is no longer a defendant, the court will not consider any of the plaintiffs' allegations against Roman as forming predicate acts for RICO purposes.

f. Robert Luskin

[8] At oral argument, plaintiffs argued that the reason they believed Cheverie had fraudulent intent was because he was "very involved" in "every aspect" of Local 230. The fact that Cheverie is associated with the management of Local 230 is not enough for the court or any other trier of fact to infer fraudulent intent.

With respect to Robert Luskin, the plaintiffs appear essentially to be arguing that they were sent a number of mixed signals regarding the readmission process. They allege that a July 24, 1996 letter from Luskin, sent by fax to the plaintiffs' prior attorney, Mark Mercier, was wire fraud. That letter stated, "I have directed Local 230 to permit Messrs. Wall and Cooksey to exercise their right to readmission. . . .As I understand matters, it is now for Messrs. Wall and Cooksey to decide whether or not they wish to exercise their right to re-admission, based in part upon the issues that you and I discussed." Exh. J. to Standing Order [Compliance] (Dkt. No. 37) at 1. The plaintiffs apparently contend that this statement directly contradicts a statement made in a declaration filed by Luskin in the 942 case, which stated, "upon review of LIUNA's long established interpretation and application of its constitutionally based readmission right I concur that readmission right afforded members of LIUNA must be exercised within twelve (12) months of a members dues delinquency," except where such delay was due to conduct prohibited by one of the LIUNA governing documents. See Exh. J to Standing Order [Compliance] at 1-2. They also contend it was contradicted by Bearse's

statements in an affidavit dated October 6,1997, and a January 1996 letter from Bearse to Wall stating that his understanding was that the plaintiffs had been registered for job referrals by Local 230. However, they have not alleged any facts, other than a general conspiracy theory, to explain how these various statements are fraudulent, or why they must be fraudulent rather than merely reflecting the efforts of plaintiffs' prior counsel and attorney Bearse to negotiate the plaintiffs' readmission to the union.

g. Other Fraudulent Statements

Finally, with respect to 1997 incident, the plaintiffs allege that "[I]n October 1997, the officers collectively used the mails to the membership [of Local 230] this following statement. . .:

> [C]ontrary to Brother Manos' wild imagination, there was no assault during the July Executive Board Meeting at Capriccio Restaurant. The minutes are accurate as accepted by the Executive Board. The Hartford Police have already dropped the case and the GEB will do the same.

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Second Amended Complaint at 17.[9] The plaintiffs allege these statements are fraudulent because Stephen Manos was assaulted during the July Board Meeting, allegedly for questioning the management of Local 230's finances and cooperating with federal investigators, and that the letter was mailed to intimidate Manos and other potential critics of the union leadership.

Here, the plaintiffs have identified the time, content and place of the statement, generally identified the speakers, and stated the alleged purpose of the letter. Moreover, the plaintiffs have adequately alleged facts from which the court can draw an inference of fraudulent intent: The officers of Local 230 were presumably in attendance at the July 30, 1997 meeting and were therefore in a position to know whether Manos was assaulted at that meeting. Assuming the plaintiffs are correct and Manos was assaulted at the meeting, the officer of Local 230 must therefore have known that a statement to the contrary was a false or misleading statement. Thus, the court will consider the allegations

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[9] At oral argument, the plaintiffs clarified that the "officers" to whom they were referring were LeConche, Pezzente and Vere O. Haynes.

concerning the mailing of this statement to Local 230's members as a "predicate act".[10]

2. WITNESS TAMPERING

The plaintiffs also claim they are alleging a violation of 18 U.S.C. 1512 as a predicate act for RICO purposes. Section 1512 generally tampering with witness, victims or informants in an effort to affect their testimony or communications with law enforcement officials.[11]

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[10] The defendants argue that because the plaintiffs have not alleged that anyone relied on the statement or that they were harmed by it, their allegations must fail. However, the plaintiffs are alleging fraud under the mail fraud statute, not common law fraud. Reliance and damages are not incorporated into the federal mail fraud statute. See Neder v. United States, 527 u. S. I, 24-25 (1999). Thus, the plaintiffs; failure to allege reliance or damages is not fatal to this predicate act.

[11] Section 1512(a) makes punishable the killing or attempted killing of a person with the intent to prevent his testimony, prevent the production of documents, or prevent any person from communicating with federal law enforcement officers regarding the commission or possible commission of a federal offense. See 18 U.S.C. 1512(a).

Section 1512(b) makes punishable the knowing use of intimidation or physical force, bribery, or fraud with intent to (1) influence or prevent that person's

On the face of the pleadings, the plaintiffs appear to be alleging a claim against Frank Freeman, who allegedly "assaulted Mr. Manos for the purpose of maintenance and control of the enterprise" at a meeting on July 30, 1997. Second Amended Complaint at 9. However, at oral argument, the plaintiffs contended that they were not attempting to allege a witness tampering claim against Freeman, but rather were alleging that LeConche interfered with Manos' possible testimony or assistance to law enforcement by filing suit against him.

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testimony in an official proceeding, (2) cause that person no withhold testimony, alter documents, or refuse to comply with a subpoena, or (3) cause that person to fail to provide a federal law enforcement officer with information relating to the commission or possible commission of a federal offense. See 18 U.S.C. 1512(b).

Section 1512(c) makes punishable harassment which dissuades or prevents a person from (1) testifying in an official proceeding, (2) reporting the commission or possible commission of a federal offense to law enforcement officers, (3) arresting or seeking another's arrest in connection with federal offense, or (4) causing a criminal prosecution or other criminal proceeding to be instituted. See 18 U.S.C. 1512 (c).

The statute specifically states that an official proceeding need not already be pending at the time of the offense. See 28 U.S.C. 1512 (e)(1).

Neither the alleged assault by Freeman, which plaintiffs themselves allege in their pleadings was in response to criticisms Manos made of the union's accounting practices, nor the lawsuit filed by LeConche, as to which the plaintiffs have not made any allegations, alone constitute sufficient evidence of witness tampering. The plaintiffs do not contend that the assault was for the purpose of preventing Manos from testifying in any official proceeding or even that it was related to Manos' alleged cooperation with federal law enforcement officials. Although the plaintiffs did argue at oral argument that the filing of the lawsuit by LeConche was intended to prevent Manos from speaking with federal law enforcement officials about the management of the union, the mere allegation that LeConche filed a lawsuit cannot state a cause of action for "intimidation or physical force, bribery, or fraud" under section 1512(b). Nor does it, without more, rise to the level of "harassment" actionable under section 1512(c).[12] Thus, the allegations of witness tampering, even construed as broadly as possible and taking into consideration plaintiffs'

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[12] The court is unaware of any case in this Circuit holding that the bringing of a lawsuit is actionable under section 1512.

explanations at oral argument, cannot constitute a predicate act under RICO.

3. HOBBS ACT

The plaintiffs next claim to allege violations of the Hobbs Act (18 U. S.C. 1951),[13] which prohibits interference with commerce by threats or violence.[14]

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[13] On pages 9-10 of the plaintiffs' compliance with the Standing Order on RICO Civil Cases [Dkt. No. 37], the plaintiffs appear to be alleging that, instead of a Hobbs Act claim under 18 U.S.C. 1951, they are actually trying to allege a violation of 29 U.S.C. 530. See e.g. Standing Order [Compliance] at 9 (distinguishing elements of Hobbs Act violation from elements of section 530 violation). However, since violations of 29 U.S.C. 530 are not predicate acts for RICO purposes, the court will continue to construe the plaintiffs' complaint as alleging Hobbs Act and witness tampering violations instead.

[14] Section 1951 states, in relevant part, "Whoever in any way or degree obstructs...commerce...by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section, shall be fined under this title or imprisoned not more than twenty years, or both." 18 U. S.C. 1951(a). The Act defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. 1951(b)(2).

The "Property the plaintiffs contend was extorted from them includes their membership rights (see Second Amended Complaint at 6) and right to work. See Re-Pleading of Second Amended Complaint at 16 ("The Hobbs Act where Plaintiff Wall consensually gives up his book pursuant to a settlement with the union and the NLRB and Mr. Cooksey is told by the NLRB he will get his book back per the settlement.")[15]

However, the plaintiffs only allege in a conclusory fashion that extortion has occurred.[16] They do allege that threats were

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[15] More generally, the plaintiffs allege that historically, the union has conducted "shakedown collections for everything" and that Wall was removed as shop steward due to his refusal to make such collections. See Standing Order [Compliance] at 5 (citing ruling of Judge Wallace Nation in NLRB Case No. 39-CB-827). However, this matter was apparently resolved before the NLRB. Moreover, the plaintiffs do not allege any time frame for any adverse actions taken against them by the union. The plaintiffs also do not allege that Wall consenually stepped down as shop steward in response to threats or physical violence, so any adverse employment action taken against Wall cannot qualify as a Hobbs Act violation. See 18 U.S.C. 1851(b)(2) (element of extortion is that property be taken with the victim's consent).

[16] See e.g., Re-Pleading of Second Amended Complaint at 7 ("Plaintiff Manos experienced a violent extortion and was forced into retirement through fear.");

made by LeConche, see, e.g., Amended Statement in Compliance with Standing Order [Dkt. No. 52] at 12-13, and that one of the plaintiffs was assaulted, see e.g., Amended Statement at 9, but they have not alleged that they parted with their union books or their pensions or any other property voluntarily, as a direct result of such threats of force or violence. In fact, nothing in the plaintiffs' pleadings even places the alleged threats in the same time period as the loss of the plaintiffs' union memberships. Rather, the materials submitted by the plaintiffs themselves indicate that the plaintiffs were removed from union membership for failure to pay union

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Second Amended Complaint at 6 ("Mr. Bearse is being charged with…the extortion of Plaintiff Wall and Cooksey's membership rights…") Second Amended Complaint at 7 ("Since October 15, 1970, Mr. Lopreato has committed multiple predicate acts of extortion of the plaintiffs[']membership rights..and pension rights in the furtherance of an enterprise."; "Mr. Pezzente has made extortion collections on construction jobs for Dominick Lopreato, Arthur Coia, Sr., Arthur Coia, Jr. and Charles LeConche"); Second Amended Complaint at 8 ("Mr. LeConche has extorted the membership right of all three plaintiff[s] in separate schemes."); Second Amended Complaint at 8 (Mr. Cheverie['s] actions go beyond that of legal counsel through the commission of multiple predicate acts of extortion of membership rights….").

dues.[17] Nor do the plaintiffs allege that any such threats or extortion affected commerce in any way. See 18 U. S.C. 1951. Thus, the plaintiffs have failed to allege facts that, if proven, would support a finding of a Hobbs Act violation as a predicate act under RICO.

4. EMBEZZLEMENT OF UNION FUNDS

The plaintiffs cite to 29 U.S.C. 501 in their complaint, see Second Amended Complaint at 5. Only subsection (c) of that statute can be a predicate act under RICO. See 18 U.S.C. 1961(1). However, the plaintiffs have not alleged sufficient facts in support of this predicate act. The court presumes the plaintiffs are referring to actions taken by Local 230 with respect to their pension funds. However, the plaintiffs have not alleged that the plaintiffs' pension funds were ever the property of the union, nor

[17] The plaintiffs have not alleged that they failed to pay their union dues out of fear caused by any of the defendants.

that they were converted to the personal use of the defendants.[18] Moreover, the plaintiffs have not identified the dates on which any such acts occurred, so the court is unable to determine whether such acts occurred within the four year statute of limitations or within ten years of any other predicate acts.

5. OTHER RICO ELEMENTS

As the plaintiffs have failed to allege sufficient facts to establish two predicate acts, the court need not further consider whether the plaintiffs have met the other elements of RICO claim. However, the court does note that, even if two predicate acts had been adequately pleaded, the plaintiffs have not met the other requirements of pleading a "pattern of racketeering activity."

First, the plaintiffs have not alleged that the acts were related. Predicate acts are "related" when they have "the same or

[18] At oral argument, the plaintiffs clarified that the pension fund issue fell within the scope of this lawsuit because Lopreato was also the trustee of the fund. However, this does not make the pension fund money "union property," nor is an allegation as to Lopreato's position with respect to the fund sufficient for a trier of fact to infer that Lopreato took the money in the fund for his personal use.

similar purposes, results, participants, victims, methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." See Bernstein v. Misk, 948 F. Supp. 228,236 (E.D.N.Y. 1997) quoting H.J. Inc. v. Northwestern Bell Tel Co., 492 U. S. 229, 240 (1989)).

Although the plaintiffs' pleadings provide a lengthy background on corruption in Local 230 dating back to 1970, nothing in the pleadings serves to connect such events to the events they claim are "predicate acts." Other than general allegations that Local 230 has been under the control of Arthur Coia and his cohorts, nothing connects the defendants' alleged predicate acts to one another or the alleged Coia "machine" other than the mere fact that each of the defendants is an employee or member of Local 230, and thus are alleged to have been committing these wide-ranging acts in order to maintain the alleged "enterprise." In fact, no one defendant is alleged to have committed or been involved in more than one or two of the alleged acts. See, e.g. United States v. Private Sanitation Industry Ass'n of Nassau/Suffolk, Inc. 793 F. Supp. 1114, 1128 (E.D.N.Y. 1992) (clarifying that section 1962(c) "declares it illegal for a person - -not for an enterprise - -to engage

in a pattern of racketeering activity" and therefore finding that plaintiff had to allege pattern of racketeering activity conducted by each defendant, not merely the "enterprise") (quoting United States v. Persico, 832 F.2d 705 (2d Cir. 1987)).

Second, although the plaintiffs have generally alleged that the Coia enterprise is an ongoing illegal operation, no specific facts plead by the plaintiffs suggest that the alleged improper acts committed by the defendants amount to or pose a threat of continuing criminal activity, which is another required element of civil RICO cause of action. See generally H. J., Inc. supra, 492 U. S. 229 (defining continuity requirement). The plaintiffs have not explained what illegal purpose such an extensive enterprise serves. Although they have alleged that the enterprise sought to keep the plaintiffs out of the union, they have not alleged how that constitutes an ongoing operation or how it is illegal. The plaintiffs have not even alleged facts that if proven, would show that they are legally entitled to be reinstated as union members.

Thus, having failed to plead facts sufficient, if proven, to constitute a pattern of racketeering activity, the plaintiffs have failed to state a claim under the civil RICO statute.

The court notes that it is bound to construe pro se complaints broadly, and that courts should afford pro se litigants "every reasonable opportunity" to demonstrate they have a valid claim. See Bobal v. Rensselaer Polytechnic Institute 916 F. 2d 759, 762 (2d Cir. 1990) (citations omitted); see also Branum v. Clark 927 F.2d 698 (2d Cir. 1991) (finding courts "should not dismiss without granting leave to amend at least once"). However, the court need not provide a pro se plaintiff unlimited opportunities to replead a complaint. See, e. g., Barsella v. United States 135 F.R.D. 64, 66-67 (S.D.N.Y. 1991) (dismissing amended complaint and denying leave to amend where court had advised pro se plaintiff of deficiencies in earlier version of complaint and plaintiff failed to correct deficiencies) (citing Salahuddin v. Cuomo, 861 F2d 40, 42 (2d Cir. 1988)). See also Hitchcock v. Woodside Literary Agency, 15 F. Supp. 2d 246, 252 (E.D. N. Y. 1998) (dismissing RICO complaint with prejudice where plaintiff had, "on her second attempt, fallen far short of stating a claim under

RICO and set forth no facts that suggest that she could ever succeed in this regard"); Brown v. Resolution Trust Co., 1995 WL 43674 at *5 (S.D. N. Y 1995) (allowing pro se plaintiffs to replead a seond time, but warning that "they will not be afforded this opportunity again").

In this case, the complaint has already been dismissed twice and the plaintiffs were granted leave to replead each time. In total, three versions of the Complaint and numerous supporting documents, including affidavits, exhibits, and additional filings such as the Compliance with the Standing Order on Civil RICO cases have been filed and treated liberally by the court as incorporated into the Complaint. In the court's last ruling on a motion to dismiss, dated July 29, 1999, the court clearly indicated that the plaintiffs were required to allege a pattern of racketeering activity in order to state a claim under RICO. See Ruling [Dkt. No. 97] at 2. The court explained that, in order to prove a pattern of racketeering activity, the plaintiffs had to allege two predicate acts and had to show that the predicate acts were related and amounted to, or posed a threat of, continuing criminal activity. The court further stated the elements of Hobbs Act violation and

explained that the plaintiffs had not pled facts that, if true, would meet these elements. The mail and wire fraud claims were similarly dismissed at that time because, as the court explained, the plaintiffs had not adequately explained how the statements were deceptive or misleading under Rule 9(b). Finally, the court then also explained that the plaintiffs had to allege facts that would allow that the acts were related and could constitute continuing criminal activity.

Despite the court's effort to explain to the plaintiffs that they must allege facts to support all of the elements of a RICO cause of action, the plaintiffs have continued to insist that all they must allege to state a claim under RICO is the existence of an "enterprise." The plaintiffs have not remedied the pleading deficiencies with respect to their RICO claim that the court specifically identified in its July 1999 Ruling. The plaintiffs were advised in July of 1999 that they would only be allowed "one final opportunity" to replead their claims if they had a proper basis to do so. See Ruling [Dkt. No. 97] at 6 (emphasis in original). They have not done so. The court therefore dismisses with prejudice the plaintiffs' RICO claim as to all defendants.

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C. PROCEDURAL DUE PROCESS

In addition to their RICO claim, the plaintiffs also allege that defendant Luskin violated the plaintiffs' due process rights.[19] The first question the court must determine is whether defendant Luskin can be said to be a "state actor" for purposes of a due process claim.

The plaintiffs allege that because Luskin has been appointed by the Department of Justice as an "in-house prosecutor per agreement with the Department of Justice," he is a government

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[19] The court notes that the plaintiffs cite to the Due Process Clause of the Fourteenth Amendment, which states, in relevant part, "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U. S. Const. Amend. XIV, 1. However, the Fourteenth Amendment applies only to actions taken by state governments. The plaintiffs have not alleged that defendant Luskin was acting under authority granted to him by the State of Connecticut or any other state, but rather, they allege that he was acting under authority delegated by the federal Department of Justice. The court therefore construes the plaintiffs' claim as one that they intended to bring under the Fifth Amendment to the United States Constitution, which applies to action taken by the federal government and states, "No person shall . . .be deprived of life, liberty, or property, without due process of law." U. S. Const. Amend. V.

actor. As far as the court can gather form the materials submitted by the plaintiffs, Luskin is the General Executive Board Attorney for LIUNA. Other than the fact that LIUNA entered into an "operational agreement" with the Department of Justice, and the fact that Luskin was appointed GEB Attorney pursuant to that agreement, the plaintiffs allege no facts that support a conclusion that Luskin is a government actor.

Looking therefore to Exhibit F to the plaintiffs' Standing Order [Compliance] [Dkt. No. 37], the court notes that the "Operating Agreement" was designed to be a less formal agreement than a consent decree, with less direct government involvement in the management of the union. See Exh. F to Standing Order [Compliance] at 50-54. The Second Circuit has consistently held that persons appointed to union management positions pursuant to a consent decree are not necessarily government actors, even where their salaries may be paid by the

government. See United States v. International Bhd. of Teamsters, 156 F3d 354, 359-60 (2d Cir. 1998).[20] What would be required for state action in this case is that defendant Luskin be acting at the direction of the Department of Justice, and that his actions taken pursuant to such direction be in violation of the plaintiffs' due process rights.

The plaintiffs have not alleged that Luskin is an employee of the Department of Justice, nor have they complained of any actions taken by him at the direction of the Department of Justice.

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[20] Plaintiffs attempt to distinguish this case because the IBT case involved a "consent decree," as opposed to the "operational agreement" in effect here. However, from the documents submitted by the plaintiffs themselves and incorporated by reference into the Complaint, it appears that the operational agreement entails even less government involvement and oversight than a consent decree would. See Exh. F to Standing Order [Compliance] [Dkt. No. 37]. Thus, if a union manager paid by the government under a consent decree is not, as a matter of law, a "state actor," then a union manager not paid by the government under the operational agreement similarly could not be considered a "state actor." Moreover, the LIUNA Constitution has incorporated the operational agreement in the same way the IBT has incorporated the consent decree into its Constitution, thus making the Second Circuit's reasoning applicable here.

In fact, other than the actions the plaintiffs complain of with respect to their RICO claim, the plaintiffs have not alleged any actions taken by Luskin that could amount to a violation of the due process clause. As counsel for the defendants observed at oral argument, it is not at all clear from the Complaint what it is the plaintiffs claim Luskin has done wrong.

For the foregoing reasons, the plaintiffs' claim against defendant Luskin for violation of the due process clause is dismissed. However, unlike the RICO claims, this Ruling is the first time the court has addressed the plaintiffs' due process claim against Luskin.[21] Therefore, the court grants the plaintiffs one final opportunity to replead as to their due process claim only, and only if they can allege sufficient facts that, if proved, would show that (1) defendant Luskin is acting at the direction of the government, or pursuant to some rule of conduct imposed by the government, and (2) that defendant Luskin's actions resulted in the

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[21] The Amended Complaint [Dkt. No. 59] made mention of the claim, but it was not addressed in the July 1999 Ruling and was not subject to the court's warning in that Ruling that the plaintiffs would only have one last opportunity to amend their claims.

deprivation of the plaintiffs liberty or property interests without due process of law. Should the plaintiffs choose to file an amended complaint in accordance with this order, the court reminds them that they need not cite cases in their complaint, but, pursuant to Federal Rule of Civil Procedure 8(a), must include only a "short and plain statement of the claim." Fed. R. Civ P. 8(a)

III. MOTIONS TO AMEND

The plaintiffs have filed two motions seeking leave to amend their complaint further. The first proposes to add Gene Julian as a plaintiff, while the second seeks to add an additional claim against defendant Luskin.

Pleadings may be amended, pursuant to Federal Rule of Civil Procedure 15(a), once as of right, and thereafter only by leave of the court or stipulation. Leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). "Narrow pleading rules should not be applied to foil an honest plaintiff's efforts to gain redress," and undue delay alone is generally not a valid reason to deny a motion to amend. Middle Atlantic Utilities Co. v. S.M.W. Development Corp. 392 F.2d 380, 384,85 (1968)

(holding three year delay from filing of initial complaint inadequate basis for denying motion to amend, in absence of bad faith or prejudice to defendant). However, leave to amend may be denied, in the court's discretion, when such amendments would cause prejudicial delay, are offered in bad faith or for a dilatory motive, or would be futile, or when they come after repeated failure to cure deficiencies by amendments previously allowed. See Forman v. Davis 371 U.S. 178, 182 (1962). Applying this standard, the court turns to the plaintiffs two motions to amend.

A. DEFENDANT LUSKIN

Subsequent to the filing of defendant Luskin's Motion to Dismiss, the plaintiffs filed a motion to amend seeking to add new allegations to their claims against defendant Luskin. This time, plaintiffs appear to be attempting to add a claim that defendant Luskin has violated the Equal Protection Clause of the Fourteenth Amendment. See Memorandum of Law In Support of Plaintiffs' Motion at 2-3 (citing Equal Protection cases). However, the Equal Protection Clause applies only to those acting under color of state law. In this case, for such allegations to state a cause of action,

Luskin would have to be acting as an employee, official or agent of the State of Connecticut. There are no allegations in the Complaint or in the plaintiffs' motion that would suggest that he is a Connecticut official, employee or agent, or an official, employee or agent of any other state. The only government connection the plaintiffs have mentioned anywhere in their pleadings and briefs with respect to defendant Luskin is an alleged connection to the Department of Justice. Because the Fourteenth Amendment only applies to the states, actions by federal officials or employees cannot be Fourteenth Amendment violations.

Since adding an Equal Protection claim would be futile in this case, the plaintiffs' motion to amend to add an equal protection against defendant Luskin is denied.

B. GENE JULIAN

The plaintiffs have also moved to amend to add Gene Julian as an additional plaintiff with respect to their RICO claim. At oral argument on the various pending motions, the plaintiffs agreed to withdraw this motion. However, the plaintiffs have not filed a withdrawal of the motion. The court therefore denies the

motion without prejudice to renew, in keeping with the agreement of the parties at oral argument that Gene Julian need not be added as a party.

IV. MOTION TO CLARIFY

Following oral argument on June 19, 2000, the plaintiffs filed a motion seeking leave to further clarify the pleadings filed to date. In support of the plaintiffs' motion, they renew their argument that the court and the defendants should be focusing on the plaintiffs' allegations of an "enterprise," rather than the "pattern of racketeering activity" element. See Memorandum In Support [Dkt. No. 156] at 3. As noted in Footnote 3, supra, focusing on the "enterprise" aspect of the plaintiffs' RICO claim would not make any difference in the outcome of this ruling, because the plaintiffs have not met other, equally important RICO elements, including alleging a pattern of racketeering activity. Thus, "clarifying" the pleadings by adding "[a]n explanation of the amplified pleading to show an 'enterprise'" would not assist the court in making its determination, and denying the plaintiffs leave to file additional materials on that point will not prejudice them.

In addition, although the plaintiffs have not attached a proposed amended pleading or clarifying pleading to their motion, they do represent the following:

> The amendment will . . . give the defendants a clear showing of what they have to defendant against. It will not be lengthy and there will be no new facts. . . It will refer to conduct already plead to date. . . .
>
> It will be . . .on facts already pleaded to date that will be referred to in the presentation of the violations format.

See Memorandum in Support at 6-7. The court appreciates the plaintiffs' efforts to further clarify and better organize the issues. However, the difficulty faced by the court in addressing the pending motions to dismiss is not merely the organization of the factual allegations, but their sufficiency. In short, in the absence of additional facts, which the plaintiffs are unable to allege in good

faith at this time,[22] it appears that the plaintiffs cannot state a claim under RICO and will likely not be able to do so, Thus, the court does not need additional clarification as to the meaning of the "enterprise" and the organization of their factual allegations, and the plaintiffs' motion is denied.

V. CONCLUSION

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[22] The plaintiffs conceded at oral argument, with respect to several of their claims, that they would not be able to allege additional facts without discovery. Unfortunately, under the Federal Rules of Civil Procedure, the plaintiffs are not entitled to discovery in search of a sufficient factual basis to support their complaint. See. e. g. Segan v. Dreyfus Corp. 513 F.2d 695, 696 (2d Cir. 1975) (finding motion for discovery properly denied where plaintiff sought broad discovery prior to filing more definite statement of fraud); Solarex Corp. v. Arco Solar, Inc. 121 F.R.D. 163,79 (E.D.N.Y. 1988) ("in this Circuit, it is established that, at least with respect to allegations of fraud or inequitable conduct, it is improper to use discovery in search of a factual predicate required to be pleaded in the first instance.") (citations omitted); Robco Distribs, Inc. v. General Glass Int'l Corp., 101 F.R.D. 547, 548 (E.D.N.Y. 1984) (noting that a party "may not employ discovery for a 'fishing expedition'" and that "Rule 11 requires that an attorney filing a complaint certify that the complaint is well grounded prior to discovery").

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In conclusion, the plaintiffs' motions for a hearing on the motions to dismiss [Dkt. Nos. 107 and 115] have been GRANTED, and oral argument was held on June 19, 2000.

Defendant Cheverie, et al's Motion to Dismiss [Dkt. No. 105] is GRANTED with prejudice, and defendant Luskin's Motion to Dismiss [Dkt. No. 109] is GRANTED with prejudice except that it is without prejudice as to the due process claim only. The plaintiff is given leave to replead as to the due process claim against Luskin only, in accordance with this Ruling, within 30 days of the date of this Ruling.

Plaintiffs' Motion to Amend to add an equal protection claim against defendant Luskin [Dkt. No. 145] is DENIED as futile. Plaintiffs' Motion to Amend to add Gene Julian as a plaintiff [Dkt. No. 123 is DENIED per agreement of the parties on the record. Plaintiffs' Motion to Clarify [Dkt. No. 155] is DENIED as futile, and defendants' Motion to Stay Discovery [Dkt. No. 130-2] is DENIED as moot in light of the instant Ruling.

Finally, at oral argument on June 19, 2000, Attorney Reed made an oral motion to withdraw as counsel for LIUNA, which

was granted by the court. Therefore, plaintiffs' Motion for Clarification of Representation of Defendant Luskin and LIUNA [Dkt. No. 140] was GRANTED and the matter was clarified on the record.

SO ORDERED.

Dated at Bridgeport, Connecticut this 11th day of July, 2000.

Janet C. Hall

United States District Judge

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UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

GARY R. WALL,
WILLIAM COOKSEY, SR.
STEPHEN MANOS 3;97CV2502 JCH

v.

ROBERT LUSKIN, VERE O HAYNES,
MICHAEL S. BEARSE, LABORS LOCAL 230,
LABORERS INTERNATIONAL UNION,
DOMINICK LOPREATO, JOHN PEZZENTE,
CHARLES LECONCHE, ROBERT CHEVERIE,
HARRIET ROMAN, FRANK FREEMAN,
LUSKIN/COIA/LOPREATO GROUP,
"L.C.L." THE ENTERPRISE

JUDGMENT

This matter came on before the Honorable Janet C. Hall, United States District Judge, as a result of defendants' motions to dismiss.

The Court has reviewed all of the papers filed in conjunction with the motion and heard oral argument. On July 12, 2000, a Ruling on Pending Motions entered granting the defendants' Cheverie, et al motion to dismiss with prejudice and granting defendant Luskin's motion to dismiss with prejudice except that it is without prejudice as to the due process claim only.

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Therefore, it is ORDERED and ADJUDGED that judgment is entered for the defendants and the case is closed.

Dated at Bridgeport, Connecticut, this 14th day of July, 2000.

KEVIN F. ROWE, Clerk

By CHYSTINI O. CODY
Deputy-in-Charge

Entered on Docket_____

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No. 01-1401

IN THE

Supreme Court of the United States

GARY R. WALL, WILLIAM COOKSEY, SR., and STEPHEN MANOS,

Petitioners,

v.

ROBERT M. CHEVERIE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Brief In Opposition For Respondents Robert M. Cheverie, Charles Leconche, Dominick-Lopreato, John Pezzente, Laborers' International Union Of North America, Vere O. Haynes, Michael S. Bearse, General Counsel, LIUNA, Frank Freeman, And Laborers' Local 230

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STATEMENT OF THE CASE

I. *Nature of the Case*

Pro Se Petitioners' Second Amended Complaint, dated August 30, 1999, sought to allege a cause of action under the civil remedy provision of the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964(c) (A-118). Plaintiff-Appellant-Petitioners' Second Amended RICO Complaint alleged that they have been deprived of their "*intangible property rights*," their "*right to union membership*", their right to "*employment*", their "*LMRDA right to self determination*," and their "*constitutional right to due process.*"

The Second Amended Complaint invoked the District Court's jurisdiction "*pursuant to 18 U.S.C. § 1964(c) for violation of 18 U.S.C. § 1962(b)(c)(d) and violations of 18 U.S.C. § 1961(1)(5).*" The Second Amended Complaint defined the "Nature of the Case" as an action "*against an enterprise [18 U.S.C. § 1961(4)] and the entities that are part of the enterprise [18 U.S.C. § 1961(3)] and the defendant persons [18 U.S.C. § 1961(3)] that are associates of the said enterprise.*" Claim One of the Second Amended Complaint asserted violations of numerous statutes "*in the control and maintenance of [18 U.S.C. § 1961(4)]*, a RICO enterprise. The second claim of the two count Second Amended Complaint asserted Defendant Luskin "*violated the procedural due process clause of the fourteenth amendment of the United States Constitution violating the constitutional right of the plaintiffs in the District and Commonwealth of Connecticut.*"

The three Pro Se Plaintiff-Appellants-Petitioners include Gary Wall and William Cooksey, Sr., former members of Defendant Laborers' Local 230 (having voluntarily relinquished

their membership for non-payment of required dues payments in 1990 and 1992, respectively), and Pro Se Plaintiff Stephen Manos, a retired member of Local 230.

On August 30, 1999, Petitioners brought their Pro Se Second Amended RICO action against the Laborers' International Union of North America ("LIUNA"), Laborers' Local Union 230 ("Local 230"), Charles LeConche (Business Manager of Local 230 since 1995), John Pezzente (Secretary-Treasurer of Local 230), Dominick Lopreato (former member and Business Manager of Local 230, resigned 1995), Frank Freeman (Sergeant-at-Arms of Local 230 and, since 1998, an Executive Board member of Local 230), Harriet Roman (office secretary of Local 230),[1] Vere O. Haynes (Third Vice President of LIUNA), Michael S. Bearse, Esq. (General Counsel for LIUNA), Robert Luskin, Esq. (General Executive Board Attorney for oversight and implementation of Union Ethics and Disciplinary Procedures since 1995), and Robert M. Cheverie Esq. (a labor lawyer representing many unions, including Laborers' Local 230).

The law firm of Robert M. Cheverie & Associates, P.C. represents all the Defendant-Appellee-Respondents with the exceptions of the Defendant identified as the "Luskin/Coia/ Lopreato Group," and Robert Luskin, who is represented by Attorney Terrance G. Reed. Plaintiffs refer to the alleged Luskin/Coia/Lopreato group "L.C.L." as "The Enterprise." Such defendant does not and has never existed. Moreover, no factual assertions within the Second Amended Complaint or other assorted pleadings explain the actual existence of this alleged defendant.

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1. At Oral Argument held on June 19, 2000 on the Defendants' Motion to Dismiss, Plaintiffs stipulated to the withdrawal of Harriet Roman as a defendant.

II. *Proceedings Below*

Petitioners' endeavor at a RICO action began with Plaintiff Gary Wall's Pro Se attempt to plead a self styled "RICO Injunction" filed on December 1, 1997. The District Court determined that among the shortcomings of this effort was Plaintiff Wall's failure to make a showing of irreparable harm. Additionally, by Ruling dated March 27, 1998, the District Court dismissed Plaintiff Wall's action because he "failed to meet his pleading requirements under RICO, ..." Specifically, the District Court entered an Order granting the Respondents' Motion to Dismiss for failure to state a claim because the alleged perjury did not constitute a predicate act under RICO. Plaintiff Wall was given leave to amend his Complaint by no later than April 22, 1998, but such leave was conditioned upon his compliance with the District Court's standing order in RICO Cases. Judgment, pursuant to Court Order dated March 27, 1998, was entered in Defendants' favor on March 31, 1998.

On the Court ordered deadline, April 22, 1998, Plaintiff Gary Wall, now joined by William Cooksey, Sr., filed (*Pro Se*) a document styled "*Standing Order Pursuant to 18 U.S.C. § 1964 Civil RICO, Subject to Fed.R.Civ.P. Rule 11*" along with a document styled "*Motion to Add to the Amended Complaint*" which purported to add various new defendants and the new plaintiff, William Cooksey. However, despite the clear and unambiguous Ruling dated March 27, 1998, the Plaintiff did not file an Amended Complaint. The Defendant-Respondents, concerned that the District Court might construe Pro Se Plaintiffs' unusual filing as a "complaint", again requested, by motion filed June 29, 1998, that Plaintiff's action be dismissed, in part, for failure to comply with the District Court's March 27, 1998 Order.

The Court Clerk would not docket the Defendant-Respondents Motion to Dismiss because the original action had been dismissed pursuant to the District Court's Ruling dated March 27, 1998 and Plaintiff, contrary to the District Court's Ruling, failed to file an Amended Complaint. Therefore, technically no Complaint existed at that time to consider dismissing. Defendants' Motion to Dismiss was rendered moot in light of the District Court's subsequent Ruling dated July 9, 1998.

At a status conference attended by the parties on July 6, 1998, the District Court granted Plaintiff-Petitoner Wall another opportunity to file an Amended Complaint. The District Court explained to Plaintiff Wall his specific pleading obligations. The District Court, by written Ruling dated July 9, 1998, stated that "*no later than August 3, 1998*" Plaintiff's Motion to Add Additional Parties must be filed. The Court further instructed that: "*Accompanying any Motion to Add Additional Parties should be a proposed Amended Complaint which would contain allegations concerning all of the present, as well as the proposed new parties.*"

The August 3, 1998 deadline passed without Plaintiff-Petitioner Wall serving his proposed Amended Complaint on the Defendants. Accordingly, Defendants, by Motion filed August 24, 1998, requested that the District Court dismiss the action because he had not served a proposed Complaint upon the Defendants as instructed by the Court.

Despite Plaintiff Wall's failure to abide by the District Court's Ruling dated July 9, 1998, the District Court, by Ruling dated September 24, 1998, denied Defendants-Respondents' Motion to Dismiss and granted Petitioners Motion to Add Additional Parties. In particular, the District Court ruled that Plaintiff Wall could add as

defendants Robert Luskin, Vere O. Haynes, Dominick Lopreato, John Pezzenti, Laborers' International Union of North America, and Laborers' Local 230 and, as plaintiffs, William Cooksey, Sr. and Stephen Manos. In addition, the Ruling dated September 24, 1998 permitted Plaintiff-Petitioner Wall to file an Amended Complaint no later than October 7, 1998. Pro Se Plaintiff-Petitioners Wall, Cooksey and Manos filed a timely Amended RICO Complaint.

By Motion dated November 30, 1998, Defendant-Respondents once again requested that the District Court dismiss Plaintiff-Petitioners' RICO Complaint because Plaintiffs' Complaint failed to allege, as to any of the Defendants, a pattern of racketeering activity or an injury from any alleged RICO violations by Defendants. Moreover, Defendants argued that most of the allegations referenced in the Complaint were barred by the applicable four-year statute of limitations.

By Ruling dated July 29, 1999, the District Court granted the Defendants'-Respondents' Motion to Dismiss because Plaintiffs failed to allege facts that could allow a reasonable finder of fact to find that any of the Defendants named in the Complaint had engaged in a "*pattern of racketeering activity*" or "*to support a conclusion that any actions by the Defendants induced any of the Plaintiffs to part consensually with any of their property, including their right to democratic participation in their union's affairs.*" Moreover, the District Court noted that much of the allegations were time barred under the applicable four-year statute of limitations. In addition, the allegations that did fall within the statute of limitations period did not constitute "*predicate acts*" or represent "*related acts*" that "*amount to, or pose a threat of, continuing criminal activity*" pursuant to the RICO statute. Likewise, the District Court found Plaintiffs' allegations of assault and of mail and wire fraud similarly insufficient.

However, because the Plaintiffs are Pro Se, the District Court allowed them "*one **final** opportunity to replead their claims.*" The District Court instructed Plaintiffs that in such repleading the defects in their Amended Complaint specifically identified in the District Court's Ruling dated July 29, 1999 must be remedied.

Plaintiff-Petitioners' Second Amended Complaint was filed on August 30, 1999. At that time, Plaintiffs motioned the Court to add Defendants Michael S. Bearse and Frank Freeman. By Ruling dated September 21, 1999, the District Court granted Plaintiffs' request. All of the Defendants, with Defendant Luskin represented and filing separately, moved to dismiss the Second Amended Complaint for failure to state a claim pursuant to Federal Rules of Civil Procedure 12(b)(6).

Defendant-Respondents argued for the third time that Plaintiffs' pleadings failed to allege a cognizable RICO violation. Defendants specifically noted that, in particular, the pleadings failed to allege as to any defendant a pattern of activity considered a predicate act under RICO or an injury from any alleged RICO violation by Defendants. Defendants again argued that in order to prove a "pattern of racketeering," a "plaintiff must plead at least two predicate acts and must show that the predicate acts are related and that they amount to, or pose a threat of, continuing criminal activity." *GICC Capital Corp. v. Technology Finance Group, Inc.*, 67 F.3d 463, 465 (2d Cir. 1995), *cert. denied*, 518 U.S. 1017, 116 S. Ct. 2547, 135 L. Ed. 2d 1067(1996).

Plaintiff-Petitioners sought additional discovery in an effort to save their deficient third attempt at drafting a RICO Complaint. Defendants-Respondents filed a motion to stay discovery until after a ruling on the pending motions to

dismiss. By Ruling dated February 14, 2000, the District Court denied Defendants' Motion to Stay Discovery.[2]

Oral Argument was held on the Motions to Dismiss on June 19, 2000.[3] The District Court, in repeated deference to the Plaintiffs' Pro Se status, reviewed and considered all of the Plaintiffs' numerous filings in deciding the Defendants' Motion to Dismiss. By Ruling dated July 11, 2000, the District Court granted Defendants' Motion to Dismiss Plaintiffs' Second Amended RICO Complaint with prejudice and granted leave to Plaintiffs to replead the Constitutional due process claim (Second Count of the Complaint) against Defendant "Luskin *only*." The District Court ruled that Plaintiffs failed to adequately plead a "*pattern of racketeering activity*." Specifically, the Plaintiffs failed to adequately plead "*two predicate acts*" committed by any of the Defendants. They failed to assert that the alleged improper acts were "*related*." Additionally, no specific facts pled by the Plaintiffs suggested that the alleged improper acts committed by the Defendants amounted to or "*pose a threat of continuing criminal activity*." As noted by the District Court:

> Despite the court's efforts to explain to the plaintiffs that they must allege facts to support

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2. Plaintiff-Appellants assert that "Plaintiffs were allowed by the Court to take one non-party discovery of Mr. Nobili" (*See* Appellants' "Appeal in Memorandum Form," p. 10, 02/02/01). Plaintiffs were free to take additional discovery consistent with the District Court's Ruling dated February 14, 2000, but did not.

3. The two motions to dismiss under consideration on June 19, 2000 were the one filed on behalf of all of the Defendants represented by the law office of Robert M. Cheverie & Associates, P. C. and the one filed by Attorney Terrance Reed on behalf of Defendant Luskin.

> *all* of the elements of a RICO cause of action, the plaintiffs have continued to insist that all they must allege to state a claim under RICO is the existence of an "enterprise." The plaintiffs have not remedied the pleading deficiencies with respect to their RICO claim that the court specifically identified in its July 1999 Ruling. The plaintiffs were advised in July of 1999 that they would only be allowed "one *final* opportunity" to replead their claims if they had a proper basis to do so. *See* Ruling [Dkt.No.97] at 6 (emphasis in original). They have not done so. The court therefore dismisses with prejudice the plaintiffs' RICO claim as to all defendants.

(Pet. Supp. App. B38).

Judgment entered, with prejudice, against Plaintiff-Petitioners' Second Amended RICO Complaint on July 14, 2000 (Pet. Supp. App. B51-B52). The Second Circuit heard argument on August 29, 2001 and, by Summary Order dated September 6, 2001, affirmed the judgment of the District Court stating that: "*The District Court properly dismissed the RICO complaint based on its conclusion that the plaintiffs had not established the elements of a RICO claim.*" Pet. App. A6. Plaintiff-Appellants' Petitions for panel rehearing and petition for rehearing en banc were denied by Order dated November 15, 2001. Pet. App. A10-A11. The instant Petition for Certiorari (Docket No. 01-1401) was filed on February 8, 2002 and placed on the docket March 22, 2002. Additionally, Plaintiffs' accompanying Petition for Writ of Mandamus (Docket No. 01-1402) was filed and docketed on the same dates.

REASONS FOR DENYING THE WRIT

The central question presented by the Petition is whether the Second Circuit's affirmation of the District Court's dismissal of the Pro Se Plaintiff-Petitioners' Second Amended RICO Complaint ("Complaint" or "Third Version Complaint") "conflicts" with the holdings of this Court and/or Circuit Court opinions. (Pet. at *i-iii*).

The Second Amended Complaint sought to allege a cause of action under the civil remedy provisions of the Racketeering Influenced and Corrupt Organizations Act ("RICO") 18 U.S.C. § 1964(c). Pet. Supp. App. B5. The components of a proper claim under RICO are as follows: (1) that the defendant; (2) through the commission of two or more acts; (3) constituting a pattern; (4) of racketeering activity; (5) directly or indirectly invests in, or maintains an interest in; (6) an enterprise; (7) the activities of which affect interstate or foreign commerce. *DeFalco v. Dirie*, 923 F. Supp. 473, 476 (S.D.N.Y. 1996) (citing *Moss v. Morgan Stanley*, 719 F.2d 5, 17 (2d Cir. 1983), *cert. denied*, 465 U.S. 1025, 104 S. Ct. 1280, 79 L. Ed. 2d 684 (1984)).

The District Court, in dismissing the Second Amended Complaint, admonished that, *"Despite the court's efforts to explain to the plaintiffs that they must allege facts to support all of the elements of a RICO cause of action, the plaintiffs have continued to insist that all they must allege to state a claim under RICO is the existence of an 'enterprise.'"* Pet. Supp. App. at B38. Nonetheless, the Petition argues that the Court's dismissal of the Second Complaint without considering the enterprise element "conflicts" with this Court's precedent. Pet. at 17.

Pro Se Petitioner's arguments are without merit. The Second Circuit upheld the District Court's dismissal of the third version complaint because the Pro Se Plaintiffs repeatedly failed to establish the elements of a RICO claim. Pet. Supp. App. B33; Pet. App. at A4, A6. A cause of action consisting of several elements does not survive if ***any*** of the necessary elements are inadequately pled. Because Petitioners failed to state a claim, the Court is under no obligation to consider any portion of their argument. In this regard, even if the Pro Se Petitioners had sufficiently pled the "enterprise element" of their endeavored RICO action (they did not), their failure to sufficiently plead the remaining necessary elements is fatal to their claim.

The Second Circuit correctly decided the case, and the Ruling does not contradict this Court's opinions or any of the Circuit Court decisions identified in the Petition. Accordingly, Respondents respectfully urge this Honorable Court to deny the Petition for Writ of Certiorari.

I. THE SECOND CIRCUIT DECISION DOES NOT CONFLICT WITH THIS COURT'S PRECEDENT.

The first question presented by the Petition is whether the Second Circuit's affirmation of the District Court's dismissal of Claim One of Pro Se Plaintiffs' Second Amended Civil Rico Complaint "conflicts" with this Court's decisions in *Sedima, S.P.R.L. v. Imrex Company, Inc., et al.*, 473 U.S. 479, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985) and *United States v. Turkette*, 452 U.S. 576, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981). Pet. at *i.* Petitioners argue that the District Court, in not considering the "enterprise element" because the Complaint did not adequately allege "two predicate act" violations and did not adequately plead the "pattern of

racketeering element" requirement, contravened this Court's holdings in *Sedima* and *Turkette*. Pro Se Petitioners' "concise" argument, in similar fashion to their Second Circuit argument, fixes on only one of the necessary elements of an adequately pled RICO cause of action, i.e., the "enterprise" element. Pet. at 10-11. Petitioners' argument misconstrues this Court's holdings and is without merit.

The fallacy of Pro Se Petitioners' argument is demonstrated in this Court's opinion in *Sedima*. The Court in *Sedima* opined:

> A violation of Section 1962(c) . . . requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *The plaintiff must of course, allege each of these elements to state a claim* (emphasis added). Conducting an enterprise that affects interstate commerce is obviously not in itself a violation of Section 1962, nor is mere commission of the predicate offenses. In addition, the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation. . . .
>
> But the statute requires no more than this. Where the plaintiff alleges *each element of the violation*, (emphasis added) the compensable injury necessarily is the harm caused by the predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise. Those acts are, when committed in the circumstances delineated in

> Section 1962(c), "an activity which RICO was designed to deter."

Sedima, 473 U.S. 479, 498, 105 S. Ct. 3275, 3285 (1985).

The Second Circuit upheld the District Court's dismissal of Pro Se Petitioners' third version RICO Complaint because the Pro Se Plaintiffs continually failed, despite numerous instructions from the Court, to allege sufficient facts to establish the necessary minimum "two predicate act" violations essential for a RICO cause of action. Pet. Supp App. B33; Pet. at A4. Additionally, the Second Circuit affirmed the District Court's dismissal of the third version complaint because the Pro Se Petitioners did not satisfy the "pattern of racketeering activity" element of a cognizable RICO action. Pet. Supp. App. at B33, B37-38; Pet. at App. A4, A6.

Petitioners' argument contravenes the very case law upon which their argument purports to rely. Petitioners' argument ignores the requirement that *all* elements of a RICO action must be sufficiently pled in order to survive a F.R.C.P. 12(b)(6) motion to dismiss (Pet. at 17). Pro Se Petitioners assume that the *Sedima* decision requires that the Court address the "enterprise element" of RICO even when the requisite two predicate acts violations required by the statute have not sufficiently been pled and/or when the necessary "pattern element" is insufficiently pled. Pet. at 17.

Similarly, Pro Se Petitioners assume that the *Turkette* decision requires that the Court find a cognizable RICO action even in the absence of the minimal two requisite predicate acts and/or a sufficiently pled "pattern of racketeering activity" element. *Id.* The Court's decision in

Turkette is not supportive of Petitioners' argument. Rather, the Court in *Turkette* held that the term "enterprise" as used in RICO encompasses both legitimate and illegitimate enterprises and thus reversed the First Circuit's opinion that Congress did not intend to include within the definition of "enterprise" those organizations that are exclusively criminal. *Turkette*, 452 U.S. 576, 580, 101 S. Ct. 2524, 2527 (1981). Additionally, the Court in *Turkette* noted in reversing the First Circuit that considering a wholly criminal enterprise within the ambit of the statute does not mean that a "pattern of racketeering activity" is an "enterprise." With respect to Section 1962(c), an "enterprise" is not a "pattern of racketeering activity" but is an entity separate and apart from the pattern of activity in which it engages. With regard to these two distinct RICO elements, the Court in *Turkette* held:

> The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other. The "enterprise" is not the "pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages. . . .

Turkette, at 583, 101 S. Ct. at 2528-9.

This Court's opinions in *Sedima* and *Turkette* contradict rather than support Pro Se Petitioners' suppositions. Simply stated, the *Sedima* and *Turkette* opinions do not require a

court to sustain a civil RICO complaint scarce of factual pleadings sufficient to establish violations of two predicate acts and/or the "pattern of racketeering" element, regardless of the nature of the "enterprise."

The Second Circuit's Ruling does not contradict this Court's opinions in *Sedima* and *Turkette*. Accordingly, the first question presented by the Petition does not raise a conflict with established precedent of this Court. Therefore, Respondents respectfully urge this Honorable Court to deny the Petition for Writ of Certiorari.

II. THE SECOND CIRCUIT DECISION AFFIRMING THE DISTRICT COURT'S DISMISSAL OF PRO SE PETITIONERS' SECOND AMENDED COMPLAINT DOES NOT CONFLICT WITH SECOND CIRCUIT PRECEDENT.

The second question presented by the Petition is whether the Second Circuit's affirmation of the District Court's dismissal of Claim One of Pro Se Petitioners' Second Amended Civil Rico Complaint "conflicts" with Second Circuit precedent regarding the "enterprise" and "pattern" requirements of the RICO Act as to call for the exercise of the United States Supreme Court's supervisory power. Pet. at *ii*.

Without any explanation, Pro Se Petitioners assert that the Second Circuit's Ruling affirming the District Court's dismissal of their third version civil RICO Complaint presents a conflict worthy of this Court's intervention. Pet. at 17. Specifically, Petitioners assert that the Decision contradicts the earlier Second Circuit opinions of *United States v. Indelicato*, 865 F.2d 1370 (1989); *United States v. Ianniello*,

808 F.2d 184 (1986); and *United States v. Weisman*, 624 F.2d 1118 (1980). *Id.* at 18. Petitioners' assert that the impermissible conflict stems from the Second Circuit's affirmation of the District Court's reasoning that because Plaintiffs failed to allege sufficient facts to establish two predicate acts, the Court need not consider whether the Plaintiffs have met the other elements of a RICO claim. Pet. at 14, 17-18. Petitioners do not take direct aim at the District Court's reasoning in dismissing their third version Complaint, i.e. their failure to adequately allege sufficient facts to establish two predicate acts or the necessary RICO element of a "pattern of racketeering activity." Rather, Petitioners focus on the "enterprise" element not considered by the District Court because the other necessary elements of a RICO claim were not sufficiently pled.

Contrary to Pro Se Petitioners' hypothesis, the Second Circuit cases cited by Petitioners do not suggest that a RICO cause of action can survive without pleading "sufficient facts to establish two predicate acts and adequately pleading a "pattern of racketeering activity." To the contrary, the *en banc* Court in *Indelicato* held that a pattern of racketeering requires proof of at least two predicate acts that are interrelated. *Indelicato* at 1382. The Second Circuit in *Weisman* held that a RICO cause of action requires that the pattern of predicate acts be done in the conduct of the affairs of the enterprise. *Weisman*, 624 F.2d at 1122. The Second Circuit's *Ianniello* decision held that an enterprise with "a single purpose," (in that case repeated and fraudulent skimming of profits from bars and restaurants owned by the *Ianniello* defendants) continuing indefinitely, can provide the basis for a Section 1962(c) violation. *Ianniello* at 191. There is no support in these Decisions for Pro Se Petitioners' theory that the "enterprise" element must be considered in the face of insufficient pleading of other necessary RICO elements.

There is no conflict between Second Circuit precedent and the reasoning of the Second Circuit's Decision affirming the District Court's dismissal of Pro Se Petitioners' Second Amended Complaint. Accordingly, Respondents respectfully urge this Honorable Court to deny the Petition for Writ of Certiorari.

III. THE SECOND CIRCUIT DECISION AFFIRMING THE DISTRICT COURT'S DISMISSAL OF PRO SE PETITIONERS' SECOND AMENDED COMPLAINT DOES NOT CONFLICT WITH THIRD CIRCUIT PRECEDENT.

The third question presented by the Petition is whether the Second Circuit's affirmation of the District Court's dismissal of Pro Se Plaintiffs' third version Civil Rico Complaint "conflicts" with the Third Circuit's decision in *United States v. Local 560 of the International Brotherhood of Teamsters*, 780 F.2d 267 (1986). Pet. at *iii*.

Petitioners assert, without explanation, that the District Court's dismissal of the third version Complaint conflicts with the above-referenced Third Circuit opinion because the Court did not treat the criminal statute 18 U.S.C. § 2 (aiding and abetting) as a "predicate act" for purposes of considering the sufficiency of their civil RICO Complaint. Pet. at 19. Pro Se Petitioners' argument, however, misconstrues the Third Circuit's opinion and is wrong.

Section 1961 of the RICO Act specifically lists those statutory violations considered RICO predicate acts. The Third Circuit's opinion in *United States v. Local 560 of the International Brotherhood of Teamsters* does not add another predicate act to those listed in Section 1961 and it

does not treat 18 U.S.C. § 2 as a RICO predicate. Rather, the Third Circuit decision affirmed that each individual Teamsters Local 560 Executive Board member was culpable for the extortion of that Local's memberships' rights because each aided and abetted in at least two "predicate acts." *Local 560 of the I.B.T.*, at 289. That opinion revealed numerous "predicate act" offenses adequately pled in support of the Government's case against the Provenzano Group's control of Teamsters Local 560. In contrast, the Pro Se Plaintiffs, in their third version civil RICO Complaint, failed to plead sufficient facts to support a finding of two predicate violations.

Contrary to the understanding of the Pro Se Petitioners, the Third Circuit's approval of the Government's application of the criminal statute 18 U.S.C. § 2 as an *additional* source of defendant culpability in the Teamsters Local 560 case does not transform that statute into a RICO "predicate act."

There is no error in the District Court's unwillingness to treat 18 U.S.C. § 2 as a RICO "predicate" in the context of the Pro Se Plaintiffs' Second Amended Complaint. Accordingly, the Second Circuit's Decision upholding the District Court's dismissal of the third version civil RICO Complaint does not present any conflict with the Third Circuit's treatment of 18 U.S.C. § 2 in the RICO context. Therefore, Respondents respectfully urge this Honorable Court to deny the Petition for Writ of Certiorari.

IV. THE SECOND CIRCUIT DECISION AFFIRMING THE DISTRICT COURT'S DISMISSAL OF PRO SE PETITIONERS' SECOND AMENDED COMPLAINT DOES NOT CONFLICT WITH THE SECOND CIRCUIT'S *UNITED STATES v. CONCEPCION* DECISION.

The fourth question presented by the Petition is whether the Second Circuit's affirmation of the District Court's dismissal of Pro Se Petitioners' third version Civil Rico Complaint "conflicts" with the Second Circuit's en banc decision in *United States v. Concepcion*, 983 F.2d 369 (1993). Pet. at *iii*.

Petitioners assert, without explanation, that the District Court's dismissal of their Complaint conflicts with the above-referenced Second Circuit opinion because the Court did not treat 18 U.S.C. § 1959 (commission of violent crimes in furtherance of racketeering activity) as a "predicate act" for purposes of considering the sufficiency of their civil RICO Compiaint. Pet. at 19.

However, Pro Se Petitioners misconstrue the Second Circuit's opinion in *Concepcion*. That opinion does not suggest that a breach of 18 U.S.C. § 1959 should be considered as a RICO Section 1961 "predicate act." Rather, the Second Circuit's opinion in *Concepcion* simply affirms that Section 1959 compliments a RICO prosecution. The *Concepcion* opinion provides that the government may prosecute under RICO for conduct that constitutes a pattern of racketeering activity in connection with an enterprise, *and additionally*, prosecute under 18 U.S.C. § 1959 for violent crimes intended to permit the defendant to maintain or increase his position in a RICO enterprise. *Concepcion*, at

381. Section 1959 is thus an additional prosecutorial tool available to combat racketeering activity. 18 U.S.C. § 1959 is not, as Petitioners suggest, a RICO predicate.

There is no error in the District Court's Decision in not considering 18 U.S.C. § 1959 as a RICO "predicate." Accordingly, the Second Circuit's Decision upholding the District Court's dismissal of the third version civil RICO Complaint does not present any conflict with the Second Circuit's treatment of 18 U.S.C. § 1959 in the RICO context. Therefore, Respondents respectfully urge this Honorable Court to deny the Petition for Writ of Certiorari.

V. THE SECOND CIRCUIT DECISION AFFIRMING THE DISTRICT COURT'S DISMISSAL OF PRO SE PETITIONERS' SECOND AMENDED COMPLAINT DOES NOT CONFLICT WITH ANY OF PLAINTIFFS' RIGHTS.

The fifth question presented by the Petition is whether the Second Circuit's affirmation of the District Court's dismissal of Pro Se Petitioners' third version civil Rico Complaint violated "the plaintiffs' statutory rights" because "29 U.S.C. § 530" was not treated by the court as a RICO predicate. Pet. at *iv.*

Pro se Petitioners assert that the District Court's dismissal of their third version civil RICO Complaint is violative of their rights and "is contrary to common sense" because the court did not treat 29 U.S.C. § 530 (deprivation of union rights by violence or threats of violence) as a "predicate act" for purposes of considering the sufficiency of their civil RICO Complaint. Pet. at 21. Pro Se Petitioners' argument hinges upon both their misunderstanding and

misrepresentation of 18 U.S.C. § 1961(1)(C) of the RICO statute. Petitioners misrepresent to the Court that Section 1961(C) provides that, "any act which is indictable under Title 29 U.S.C. Code" is properly a RICO predicate (Pet. at 22). Petitioners are wrong. Title 18 U.S.C. § 1961(C) defines RICO racketeering activity as: "*any act which is indictable under Title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds*)." There is no authority either in the RICO statute or case law that provides that 29 U.S.C. § 530 is a RICO predicate.

There was no error in the District Court's not considering "29 U.S.C. § 530" as a RICO "predicate." Accordingly, the Second Circuit's Decision upholding the District Court's dismissal of the third version civil RICO Complaint does not present any conflict of law regarding the treatment of 29 U.S.C. § 530 in the RICO context. Therefore, Respondents respectfully urge this Honorable Court to deny the Petition for Writ of Certiorari.

VI. PETITIONERS' RIGHTS WERE NOT PREJUDICED BY THE JUDICIAL TREATMENT OF THE ISSUES RAISED IN THEIR PETITION.

The sixth question presented by the Petition is whether "the Second Circuit's panel of Hon. Chester J. Straub, Hon. Ralph K. Winter, and Hon. Thomas J. Meskill engaged in conduct prejudicial to the effective administration of justice". Pet. at *iv*.

In their sixth argument, Petitioners turn on the Court for not agreeing with their view of their RICO Complaint.

Petitioners accuse the Honorable District Court Judge Janet C. Hall of "flagrant misrepresentation," "intentional misidentification" of a Rule 59(e) Motion, "intentional concealment" and then "intentional misidentification of a Rule 60(b)(6) Motion." Pet. at *iv-v*.

Petitioners were not prejudiced in any way by the Court's treatment of their Motion for Reconsideration. The grounds for granting a reconsideration motion are limited to: (1) intervening changes in the law; (2) new evidence previously available; or (3) the need to correct a clear error of law or to prevent manifest injustice. *Doe v. New York City Dep't of Social Services*, 709 F. Supp. 782 (S.D.N.Y. 1983). To obtain reconsideration the movant must point to controlling precedent or facts that could reasonably alter the conclusion of the court. *Schrader v. CSX Corp.*, 70 F.3d 255, 257 (2d Cir. 1995). None of these grounds were presented in the Pro Se's Motion for Reconsideration. Additionally, reconsideration is not appropriate to fill in gaps identified by the court. *Carolco Pictures, Inc. v. Sirota*, 700 F. Supp. 169, 170 (S.D.N.Y. 1988). In this regard, Pro Se Petitioners' Motion for Reconsideration consisted in large part of the same misguided arguments they presented to the Second Circuit and repeat in the instant Pro Se Petition.

On July 11, 2000, the District Court dismissed Petitioners' claims against the Defendants in a well reasoned 40-page opinion. Pet. Supp. App. B1–B40.[4] The Second Circuit

4. The typographical errors that appear in the District Court's Ruling dated July 11, 2000 as reproduced in Petitioners' Supplemental Appendix do not appear in the original copy of the Ruling. In addition, some parts of the original Ruling are actually left out mid sentence. For one example, the last three sentences of footnote 2 should read,

(Cont'd)

correctly affirmed the District Court's dismissal of Petitioners' Second Amended Complaint because the Pro Se Petitioners had not established the elements of a RICO claim. The reasoning of the Ruling dismissing Pro Se Petitioners' Second Amended Complaint does not represent a conflict with any established RICO precedent, and Plaintiffs' rights were not in any way prejudiced.

(Cont'd)

> *Because allegations of a pattern of racketeering activity are a required part of a RICO action based on 18 U.S.C. § 1962(b),(c) and (d), the court must examine whether the plaintiffs have alleged sufficient facts to meet this requirement. If they have, the court would then further consider the nature of the enterprise, as plaintiffs suggest. If they have not alleged sufficient facts to meet the 'pattern' requirement, however, then the court would not reach the 'enterprise' issue and must dismiss the plaintiffs' complaint for failure to state a claim.*

For comparison see Petitioners' inarticulate reproduction at page B8 of the Supplemental Appendix.

CONCLUSION

Certiorari is not warranted. For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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